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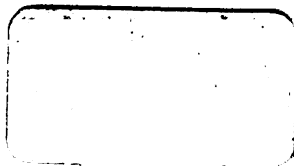
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REPORTS

OF

CASES AT LAW AND IN EQUITY

DETERMINED BY THE

SUPREME COURT

OF THE

STATE OF IOWA.

APRIL 10, 1897—OCTOBER 7, 1897.

BY

BENJ. I. SALINGER.

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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

L. G. KINNE, DES MOINES, *Chief Justice.*

H. E. DEEMER, RED OAK.

GIFFORD S. ROBINSON, SIOUX CITY.

CHAS. T. GRANGER, WAUKON.

JOSIAH GIVEN, DES MOINES.

SCOTT M. LADD, SHELDON.

OFFICERS OF THE COURT.

MILTON REMLEY, IOWA CITY, *Attorney General.*

C. T. JONES, WASHINGTON, *Clerk.*

BENJ. I. SALINGER, CARROLL, *Reporter.*

JUDGES OF THE COURTS

FROM WHICH APPEALS MAY BE TAKEN TO THE SUPREME COURT.

DISTRICT COURTS.

- First District*—HENRY BANK, JR., Keokuk.
Second District—M. A. ROBERTS, Ottumwa; T. M. FEE, Centerville;
F. W. EICHELBERGER, Bloomfield; ROBERT SLOAN, Keosauqua.
Third District—H. M. TOWNER, Corning; W. H. TEDFORD, Corydon
Fourth District—WM. HUTCHINSON, Orange City; GEO. W. WAKE-
FIELD, Sioux City; F. R. GAYNOR, Le Mars; JOHN F. OLIVER,
Odawa.
Fifth District—J. H. APPLGATE, Guthrie Center; J. H. HENDERSON,
Indianola; A. W. WILKINSON, Winterset; JAMES D. GAMBLE,
Knoxville.
Sixth District—DAVID RYAN, Newton; BEN MCCOY, Oskaloosa; A. R.
DEWEY, Washington.
Seventh District—C. M. WATERMAN, Davenport; W. F. BRANNAN,
Muscatine; P. B. WOLFE, Clinton; A. J. HOUSE, Maquoketa.
Eighth District—MARTIN J. WADE, Iowa City.
Ninth District—W. F. CONRAD, CALVIN P. HOLMES, THOMAS F.
STEVENSON, W. A. SPURRIER, Des Moines.
Tenth District—J. J. TOLEERTON, Cedar Falls; A. S. BLAIR, Man-
chester.
Eleventh District—D. R. HINDMAN, Boone; S. M. WEAVER, Iowa
Falls; BENJAMIN P. BIRDSALL, Clarion.
Twelfth District—JOHN C. SHERWIN, Mason City; J. F. CLYDE, Osage;
Thirteenth District—L. E. FELLOWS, Lansing; A. N. HOBSON, West
Union.
Fourteenth District—LOT THOMAS, Storm Lake; WILLIAM B. QUAR-
TON, Algona.
Fifteenth District—A. B. THORNELL, Sidney; WALTER I. SMITH,
Council Bluffs; N. W. MACY, Harlan; W. R. GREEN, Audubon.
Sixteenth District—S. M. ELWOOD, Sac City; Z. A. CHURCH, Jeffer-
son.
Seventeenth District—GEORGE W. BURNHAM, Vinton; OBED CASWELL,
Marshalltown.
Eighteenth District—H. M. REMLEY, Adamosa; WILLIAM G. THOMP-
SON, Marion.
Nineteenth District—FRED O'DONNELL, Dubuque; JAMES L. HUSTED,
Dubuque.
Twentieth District—JAMES D. SMYTH, Burlington; WINFIELD S. WITH-
ROW, Mt. Pleasant.

SUPERIOR COURTS.

Cedar Rapids—THOMAS M. GIBERSON.

Council Bluffs—J. E. F. MCGEE.

Keokuk—JOSEPH C. BURK.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A		
Adlefinger et al , Ritchey v.	144	Calnan, Swift v. 206
American Fire Ins. Co., Ruth-		Carraher, Furlong v. 358
ven et al. v.	550	Carroll County, Hamil v. 528
Anchor Mill Co. v Burlington,		Cason v. City of Ottumwa. 99
C. R. & N. R. Co.	262	Chicago, B & Q R. Co., Bar-
Anderson et al. v. Wedeking. 446		ris et al v. 375
Andrews et al , Kelley et al. v. 119		Chicago, Ft. M. & Des M. R'y
Aultman, Miller & Co., Bar-		Co , Burns v. 7
bee v.	278	Chicago, B. & Q R. Co., City
Auxier v. Taylor et al.	678	of Albia v. 624
		Chicago Great Western R'y
B		Co , Hemmi v. 25
Barbee v. Aultman, Miller &		Chicago & N. W. R. Co.,
Co	278	Cox v. 711
Barris et al. v. Chicago, B. &		Chicago & N. W. R. Co.,
Q R. Co.	375	Rowe v. 286
Barry, Cord v.	809	Chicago & N. W. Co., Tyler v. 631
Basom, McDonald v.	419	Chicago, R. I. & P. R. Co. ,
Baumhover v. Gregory.	733	Cowles v. 507
Becker et al. v. Calderwood. 529		Chicago, R. I. & P. R. Co. ,
Beechley v. Mulville et al.	602	Green Bay Lumber Co. v. 292
Beggs v. Duling	18	Chicago, R. I. & P. R. Co. v
Bennett v. City of Marion.	425	Haywood et al 392
Blackshere, Ludwig v.	366	Chicago, St. P. & K C. R. Co. ,
Blanden v City of Ft. Dodge 441		Moore v. 595
Blazenic v. Iowa & W. Coal		Church v. Lacy et al. 285
Co	706	City of Albia v. Chicago, B
Board of Equalization of the		& Q. R. Co. 624
City of Ottumwa, Lyons v. 1		City of Dubuque et al.,
Booth, First National Bank of		Morse et al v. 742
Dubuque v.	338	City of Ft. Dodge, Blanden v. 441
Brenton et al , Day v.	483	City of Marion, Bennett v. 425
Briggs v. Briggs	318	City of Ottumwa, Cason v. 99
Brokaw, et al , Farmer v.	246	Citizens State Bank et al ,
Brown v. Lahart.	746	Latimer et al. v. 162
Brown et al v. Zachery et al. 433		Clafin et al. v. Clafin et al . 744
Bruce et al. v. Patterson et al. 184		Clark, Norwegian Plow Co. v. 31
Burling, State v.	681	Clark v. Sommers. 733
Burlington, C. R. & N. R. Co.,		Clark, State v. 685
Anchor Mill Co. v.	262	Clifton Coal Co v. Scottish
Burns v Chicago, Ft. M. &		Union & Nat Ins Co. 300
Des M. R'y Co.	7	Cohn et al , Gilmore et al. v. 254
		Cole, Johnson v. 109
C		Cooper, State v. 146
Calder et al , Wilhelm v.	342	Cord v. Barry. 309
Calderwood, Becker et al. v.	529	Cowles v. Chicago, R. I. & P.
		R. Co. 507
		Cox v. Chicago & N W. R.
		Co 711
		Crampton, Powell v. 364

D

Darr v. Darr	458
Davis, Iowa R. R. Land Co. v ..	128
Day v. Brenton et al	482
District Township of Sheridan v. Frahm	5
Doehrel v. Hillmer et al.	169
Downey v. Riggs	88
Duffield v. Walden et al	676
Duling, Beggs, v	13
Dunn et al., Hatcher v.	411

E

Eifert, State v	188
Ekert, Poe v	361
Elwell v. Kimball et al.	720
Ennis v. Fourth St. Bldg. Ass'n of Clinton	520
Equitable Life Assur. Soc of U. S., Hannawalt v	667
Evans v. Western Union Tel. Co	219

F

Farmer v. Brokaw et al.	246
Farmers Sav. Bank of George v. Wilka	315
Finch et al. v. Garrett et al. ..	381
First Nat Bank of Dubuque v. Booth	333
Fitts & Co. v. Reinhart	311
Fitzgerald v. Nolan et al.	283
Foley et al. v. Tipton Hotel Ass'n	272
Fourth St. Bldg. Ass'n of Clinton, Ennis v	520
Frahm, District Township of Sheridan v	5
Franchere et al., McDonald v ..	496
Fred Miller Brewing Co. v. Stevens et al	60
Furenes et al. v. Severson et al	332
Furlong v. Carraher	358

G

Gadmer v. Lent	741
Garrett et al., Finch et al. v.	381
Geiger v. Payne	581
Germania Bldg. Ass'n of Clinton, Leach et al. v	125
Gilmore et al. v. Cohn	254
Goin v. Hess	140
Green Bay Lumber Co. v. Chicago, R. I. & P. R. Co.	292
Greenlee v. Iowa State Ins Co.	260

Greenlee et al. v. North British & Mercantile Ins. Co	427
Gregory, Baumhover v.	733
Griffith, Hauser v.	215

H

Hamil v. Carroll County	523
Hamilton County, Nelson v.	229
Hannawalt v. Equitable Life Assur Soc. of U. S.	667
Harlan v. Harlan et al.	701
Harley, Van Ormer v.	150
Harrison v. Hartford Fire Ins. Co	112
Hartford Fire Ins. Co., Harrison v.	112
Hatcher v. Dunn et al.	411
Hauser v. Griffith	215
Haworth v. Newell et al.	541
Haywood et al., Chicago, R. I. & P. R. Co. v	392
Heins v. Lincoln, Mayor, et al.	69
Heins v. Wicke et al.	396
Hemmi v. Chicago Great Western R'y Co.	25
Herron, Mathews v.	45
Hess, Goin v.	140
Hillmer et al., Doehrel v.	169
Home Ins. Co., Zalesky v.	613
Houdeck et al. v. Merchants & Bankers Ins Co	303
Hull et al., Wickham v.	469

I

Ill. Malleable Iron Co. v. Reed et al.	538
Independent School District of Allison, Thompson v.	94
In re Guardianship of O'Connell	355
In re Pickenbrock's Estate	81
Iowa Railroad Land Co. v. Davis	128
Iowa State Traveling Men's Ass'n, Simons v.	267
Iowa State Ins. Co., Greenlee v.	260
Iowa State Ins Co., Zalesky v.	512
Iowa & Western Coal Co., Blazenic v.	706

J

Jandt v. Potthast	223
Johnston v. Cole	109

K

Kelley et al. v. Andrews et al	119
Kimball et al., Elwell v	720
Knoll et al., Marshall County v.	578

L

Lacy et al, Church v.	235
Lahart, Brown v.	746
Lantz v. Ryman et al.	348
Latimer et al. v. Citizens State Bank et al.	162
Leach et al v. Germania B'ld'g Ass'n of Clinton	125
Lent. Gadmer v	741
Lincoln, Mayor, et al., Heins v.	69
Logan v. McCahan.	241
Ludwig v Blackshere.	366
Lund. Phillips v.	739
Lyons v. Board of Equalization of the City of Ottumwa	1

M

Markley v. Owen	492
Marshall County v. Knoll et al.	578
Mathews v. Herron	45
McCahan, Logan v.	211
McCauley et al, Steyer v	105
McDonald, Thomas v.	564
McDonald et al. v. Basom.	419
McDonald v. Franchere et al.	496
McDowell et al, Wadleigh v.	480
McGuire v. Montross	20
Merchants & Bankers Ins. Co., Houdeck v.	308
Millmeier, State v.	692
Montrose, McGuire v.	20
Moore v. Chicago, St. P. & K. C. B. Co.	595
Morris et al., Weis v.	327
Morse et al. v. City of Dubuque et al.	742
Mulhall et al., Wilts v.	458
Mulville et al, Beechley v.	602
Myrick v. Segar.	749

N

Nelson v. Hamilton County.	229
Newell et al., Haworth v.	541
Nolan et al., Fitzgerald v	283
Norwegian Plow Co. v. Clark	81
No. British & Mercantile Ins. Co, Greenlee et al. v.	427

O

O'Connell, In re Guardian-ship of	355
Owen, Markley v	492

P

Parker v. Parker	500
Parsons v. Wright.	478
Patterson et al, Bruce et al. v.	184
Payne, Geiger v.	581
Phillips v Lund	739
Pickenbrock, In re Estate	81
Pierce, Wallick v.	746
Pioneer Implement Co. v. Sterling Mfg. Co.	390
Poe v. Ekert.	361
Pothast, Jandt v.	223
Powell v. Crampton	364

R

Reed et al, Ill. Malleable Iron Co v.	538
Reinhart, Fitts & Co. v.	311
Riggs, Downey v.	86
Ritchey v. Adelfinger et al.	144
Rowe v. Chicago & N. W. R. Co.	286
Rudd et al, St. Paul & K. C. Grain Co. v.	748
Ruthven et al. v. American Fire Ins Co	550
Ryman et al, Lantz v.	348

S

Scottish Union & Nat Ins.Co., Clifton Coal Co. v.	300
Segar, Myrick v.	749
Severtson et al, Furenes et al. v	322
Simons v. Iowa State Traveling Men's Ass'n	267
Smith, State v.	656
Sneer et al. v. Stutz et al.	462
Sommers, Clark v.	733
Spaulding, State v.	639
Starry v. Treat et al.	449
State v Burling.	681
State v. Clark et al	685
State v. Cooper.	146
State v. Eifert.	188
State v. Millmeier	692
State v. Smith	656
State v. Spaulding	639
State v. Watson	651
Sterling M'fg Co., Pioneer Implement Co. v.	390

Stevens et al., Fred Miller Brewing Co. v.....	60
Steyer v. McCauley et al.....	105
St. Paul & K. C. Grain Co. v. Rudd et al.....	748
Stutz et al., Sneer et al. v....	462
Sutherland v. Sutherland et al.	535
Swift et al. v. Calnan.....	206

T

Taylor et al., Auxier v.....	673
Thomas v. McDonald.....	564
Thompson v. Independent School District of Allison..	94
Tipton Hotel Ass'n, Foley v..	272
Townsend v. White et al....	477
Treat et al., Starry v.....	449
Tyler v. Chicago & N. W. R. Co.....	632

V

Van Ormer v. Harley.....	150
--------------------------	-----

W

Wadleigh v. McDowell et al.	480
Walden et al., Duffield v.....	676
Wallick v. Pierce.....	746
Watson, State v.....	651
Wedeking, Anderson et al. v.	446
Weis v. Morris et al.....	327
Western Union Tel. Co., Evans v.....	219
Wheatley v. Wheatley.....	737
White et al., Townsend v....	477
Wicke et al., Heins v.....	396
Wickham v. Hull et al.....	469
Wilcke v. Wilcke et al.....	173
Wilhelm v. Calder et al.....	342
Wilka, Farmers Sav. Bank of George v.....	315
Wilts v. Mulhall et al.....	458
Winters v. Winters.....	53
Wright, Parsons v.....	473

Z

Zachery et al., Brown et al. v.	433
Zalesky v. Home Ins. Co.....	613
Zalesky v. Iowa State Ins. Co	512

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA
AT

DES MOINES, JANUARY TERM, A. D. 1897,

AND IN THE FIFTY-FIRST YEAR OF THE STATE.

102	1
114	108
114	109
102	1
126	264

JULIUS LYONS, Appellant, v. THE BOARD OF EQUALIZATION OF THE CITY OF OTTUMWA.*

Tax. Under the statute authorizing such court to determine as an original question the amount to be assessed, the district court, on appeal from the action of the board of equalization in raising an assessment, should, on finding that the property should not have been assessed more than the original valuation, reduce the assessment to such amount, although it finds the board acted honestly and fairly in making the increase.

Appeal from Wapello District Court.—HON. M. A. ROBERTS, Judge.

SATURDAY, APRIL 10, 1897.

*The figures on the left of the syllabi refer to corresponding figures placed on the margin of the case at the place where the point of the syllabus is decided.

THIS is an appeal on the part of the plaintiff from the action of the district court in dismissing his appeal from the defendant board of equalization. It is stipulated by the parties that the finding of facts contained in the decree of the court shall be treated as embracing all of the facts, for the purposes of this appeal. That finding is as follows: "(1) That the assessor of Center township, above county, assessed and valued the property in question (being a stock of merchandise) at five hundred dollars; that afterwards the defendant, the board of equalization, raised such assessment to one thousand two hundred and fifty dollars; that its said action was taken after due notice upon plaintiff, and was done and had in the usual prescribed way, and was regular in all respects as to the method and manner of procedure; and that said board acted carefully and deliberately in the matter, and, in view of the evidence before it, decided the case honestly and fairly, and properly and fairly exercised whatever discretion, if any, was by law vested in said board in regard to said matter. (2) From the evidence introduced upon the trial before this court, the court finds that, as compared with the assessed valuation that year, upon similar classes and kinds of merchandise in said city, and in view of the actual and fair market value of said stock of merchandise in question, as established by a preponderance of the evidence, it should have been assessed and valued at five hundred dollars, and no more." Upon the foregoing finding of facts, the court found, as conclusions of law: (1) That, under the statutes, said board was vested with the discretion of determining the facts, and making a just and equitable assessment of the property in question. (2) That as there was no proof that said discretion was not properly exercised, but, on the contrary, it appeared to have been honestly

and fairly exercised, the court had no power to change or modify the assessment as fixed by said board. It therefore dismissed the case, at plaintiff's costs. To which finding, and the judgment entered in accordance therewith, the plaintiff excepted and appeals.—*Reversed.*

Work & Lewis for appellant.

W. W. Epps, city solicitor, for appellee.

KINNE, C. J.—I. It is clear that the conclusions of law of the district court upon the facts found were wrong. This court has several times decided that, in case of such appeals, it is the duty of the district court to make a just and equitable assessment. In *Davis v. City of Clinton*, 55 Iowa, 549 (8 N. W. Rep. 423), it is said: "The duty of the circuit [now district] court on appeal was to do that which it was claimed the board failed to do,—make a just and equitable assessment." In *Grimes v. City of Burlington*, 74 Iowa, 126 (37 N. W. Rep. 107), it is said: "Upon the appeal the circuit [district] court becomes the assessing tribunal, which is clothed with authority to determine anew the sum in which the taxpayer is to be assessed. By the appeal, the assessment and equalization are set aside, or superseded, and the assessment is again made by the judgment of the circuit [district] court. * * *

* That court is required to hear the matter anew, and upon all evidence tending to direct to a just decision." See also cases cited in that opinion. Plaintiff in this case was entitled to a hearing and trial anew, regardless of the finding of the defendant board of equalization, and it was the duty of the district court, upon such hearing, to have made a just and equitable assessment of plaintiff's property. As the district court was authorized, as an original question, to

determine what amount should be assessed against plaintiff's property, it was in no way bound, affected or precluded by the assessment made by the board of equalization. It was not sitting as a court for the purpose of ascertaining whether or not the board had honestly performed its duties according to its best judgment. The district court in such cases acts independently of, and without reference to the action of, the board. As the court found from the evidence before it that plaintiff's assessment should have been fixed at five hundred dollars, it should have entered a decree in accordance with its finding, and erred in not so doing, and in dismissing the case.

II. These cases are triable *de novo* in this court. *Davis v. City of Clinton*, 55 Iowa, 549 (8 N. W. Rep. 423); *Grimes v. City of Burlington*, 74 Iowa, 123 (37 N. W. Rep. 106); *First National Bank of Albia v. City Council of Albia*, 86 Iowa, 28 (52 N. W. Rep. 334.)

Inasmuch as, upon the conceded facts as found by the district court, the assessment of plaintiff upon the property therein stated should be in the sum of five hundred dollars, this case is reversed and remanded, with instruction to the district court to enter a decree in harmony with this opinion, fixing plaintiff's assessment at the sum of five hundred dollars, and a judgment for all costs should be entered against the defendant.—REVERSED.

THE DISTRICT TOWNSHIP OF SHERIDAN, SCOTT COUNTY,
IOWA, v. J. B. FRAHM, Treasurer of Scott
County, Iowa, Appellant.

School Districts: MULCT LAW: *Municipalities.* A school district township is not a "municipality," within the laws of 1894, chapter 62, section 14, which provides that one-half the tax levied and collected on saloons, under the act, shall be paid over by the county treasurer to the municipality in which the business is conducted.

Appeal from Scott District Court.—HON. C. M. WATERMAN, Judge.

SATURDAY, APRIL 10, 1897.

PLAINTIFF, a school district known as the "District Township of Sheridan," asks a writ of mandamus commanding the defendant treasurer to pay to plaintiff one-half of the tax collected by defendant on property assessed under chapter 62, Acts of the Twenty-fifth General Assembly, for the year 1894, in said township of Sheridan. The defendant demurred to the petition upon the ground that the plaintiff is not a municipality within the meaning of said chapter. The demurrer was overruled, and, defendant electing to stand thereon, judgment was rendered against him, from which he appeals.—*Reversed.*

W. M. Chamberlin for appellant.

Davison & Lane for appellee.

GIVEN, J.—I. Chapter 62, Acts Twenty-fifth General Assembly, provide for assessing, levying, and collecting an annual tax of six hundred dollars "against each person carrying on or conducting a

place for the sale of intoxicating liquors, and also against the real property, and the owner thereof, in which or upon which said place is located." Section 14 of said chapter is as follows: "The revenue derived from the tax provided for in this act (six hundred dollars per annum) for each place where intoxicating liquors are sold, shall be paid into the county treasury, one-half to go into the general county fund, and the remainder to be paid over to the municipality in which the business taxed is conducted." The question presented on this appeal is whether the school district is a municipality within the meaning of said section. Appellant's contention is that the word "municipality" applies only to incorporated cities and towns, and several definitions are quoted in support of this contention. Appellee contends that this court has, in a number of cases cited, held that a school district, such as plaintiff, is a municipality, and that the terms "municipality" and "municipal corporation" are synonymous. It is true that these terms have been used, in some instances, as synonymous, but not when the question was so directly presented as now. It is the legislative intention in the use of this word for which we are now to inquire, rather than the technical or general sense in which it is used; yet these are proper to be considered in arriving at the legislative intention. It is a fact that places for the sale of intoxicating liquors are very generally within incorporated cities or towns, and that it is exceptional when that business is carried on elsewhere. While chapter 62 requires the tax to be assessed and collected whether or not the place be within the incorporated limits of a city or town, we are satisfied that in providing for a disposition of the revenue derived from this tax only counties and incorporated cities and towns were contemplated. We think there was an omission to provide the disposition

that should be made of one-half of the revenue when the place taxed was not within an incorporated city or town. We are confirmed in this conclusion by the fact that the Twenty-sixth General Assembly in chapter 25 of the Acts,—passed since this case was heard in the district court,—amended section 14 so as to provide that in cases like this one-half the tax shall be paid to the township authorities, to be used in the improvement of its roads. Our conclusion is that the plaintiff is not entitled to the relief asked, and that the demurrer should have been sustained.—REVERSED.

102	7
110	386

A. R. BURNS v. THE CHICAGO, FT. MADISON & DES
MOINES RAILWAY COMPANY, Appellant.

Eminent Domain: ACCEPTANCE OF DAMAGES: *Trial de novo.* The acceptance by a land owner of the amount of damages allowed him by the sheriff's jury in proceedings to condemn a railroad right of way, and the concealment of such fact, will not prevent him from recovering a larger award on appeal, where the railroad company procures an appeal on its own account because it is dissatisfied with the amount of the award, although Code, section 1256, provides that acceptance by the land owner of the damages awarded shall bar his right to appeal.

Error in Taking Evidence: CURED BY INSTRUCTIONS. In a proceeding to condemn a right of way, certain witnesses considered the fact that the proposed right of way would destroy a connection between two tracts of land by crossings under bridges in the highway. The court charged that the land owner had no right, without the consent of the supervisors, to so connect the two tracts, "and you should not consider that he had any such right, in arriving at your verdict in this case," and that "any evidence upon that subject is withdrawn from your consideration." *Held*, that the evidence was without prejudice to the defendant.

Appeal from Wapello District Court.—HON. W. I. BABB,
Judge.

SATURDAY, APRIL 10, 1897,

THIS proceeding was instituted by the defendant to condemn a right of way through the plaintiff's land, for railway purposes. The sheriff's jury assessed the damages at three hundred and seventy-five dollars, which amount the defendant paid to the sheriff, and thereupon entered upon the right of way. Both parties appealed, the defendant first perfecting its appeal. Upon trial had at the December term, 1894, to a jury, the damages were assessed at one thousand and fourteen dollars. At the next term, January 24, 1895, the defendant filed a petition for a new trial, upon the ground that within a few days after the award by the sheriff's jury, and after plaintiff had appealed therefrom, he accepted said three hundred and seventy-five dollars from the sheriff. Defendant states in said petition that it had no knowledge that said money had been paid to plaintiff until after the trial in the district court, and after the term had closed. The petition was overruled, and judgment rendered on the verdict. Defendant appeals.—*Affirmed.*

Jesse A. Baldwin and McElroy & Heindel for appellant.

McNett & Tisdale and J. W. Lewis for appellee.

GIVEN, J.—I. Appellant's first complaint is that the plaintiff and one Stever were permitted to testify to certain immaterial matters, over appellant's objection. Appellee contends that appellant did not save exceptions to the rulings complained of, so as to be entitled to a review thereof. This contention has caused us to resort to the transcript, and we conclude that appellant is entitled to a consideration of
1 the claims made in argument. To better understand the questions discussed, we will state in a general way the situation of plaintiff's land. He owns

two hundred and eighty-one acres, one hundred north, and one hundred and eighty-one acres south of the right of way. These tracts are connected by a narrow neck of land across which Owle Creek and a public highway run. There are two bridges in the highway, one spanning a ravine, and the other Owle Creek, at a sufficient height to allow stock to pass under them. The right of way is south of the creek and highway, and crosses at the narrowest part of the land. The railroad bed on this land consists of a fill on the east about forty feet high, then a cut about ten feet deep, and then, to the west line, a fill about twenty feet high. The evidence in question is to the effect that, before the railroad was built, cattle did pass under the highway bridges; that plaintiff had partially arranged with the board of supervisors so as to have an undercrossing there; that an undercrossing could be made under either highway bridge; and that, with the railroad embankments as they are, said crossings under the highway are not available. These witnesses, in estimating the value of the land before and after the right of way was taken, took into consideration the matter of these undercrossings. A number of other witnesses, however, gave estimates of the value, without reference to the matter of these undercrossings. The court, in the thirteenth paragraph of the charge, instructed, that the "plaintiff had no right, without the consent of the board of supervisors of the county, to connect the two tracts of land by an open passageway under a bridge over said highway, and you should not consider that he had any such right in arriving at your verdict in this case." Appellant's complaint is that, while this is the law of the case, these witnesses based their estimates of the difference in the value of the land before and after the right of way was taken, in part, upon the loss of the crossing

under the highway. In said thirteenth instruction, the court further said to the jury, immediately following that quoted above, that "any evidence upon that subject is withdrawn from your consideration, and you will not consider such evidence, if any, for any purpose whatever." Appellant quotes from *Potter v. Railway Co.*, 46 Iowa, 399, as follows: "Where there has been error, a presumption of prejudice arises; and, if the record fails to satisfy us that no prejudice has, in fact, been caused, then such error cannot be disregarded. This should not be left in serious doubt." Applying this rule to the record before us, we are entirely satisfied, from the instruction quoted above, and from the general tenor of all the instructions, that no prejudice has, in fact, been caused to the appellant, by admitting the evidence under consideration. The jury was instructed as to the measure of damages, and, under the instructions, must have understood that the evidence complained of was withdrawn from their consideration.

II. The appellant in connection with its petition for a new trial, filed an answer, alleging, in effect, that plaintiff had received said money from the sheriff, and that, by reason thereof, he was barred and estopped from prosecuting his appeal, and from recovering any additional sum as damages. Defendant also says in said answer that it dismisses its appeal. The learned district judge, Hon. Robert Sloan, to whom the petition for a new trial was submitted, says, in his well-considered opinion, as follows: "The evidence in relation to the payment is radically conflicting, but it is such that a new trial should be granted so far as this question is concerned, provided it would in law
2 avail the defendant anything, and reduce the
 amount of recovery in this case." We fully
 concur in this view of the evidence. The
learned judge reached the conclusion "that the alleged

payment would make no difference in the result," and it is as to the correctness of this conclusion that we now inquire. Both parties had a right to, and did, appeal; and, on appeal by either, it was the duty of the sheriff to hold the money "until the determination thereof." Code, section 1255. "Acceptance by the landowner of the damages awarded by the commissioners shall bar his right to appeal." Code, section 1256. It certainly follows that to accept the money, pending his appeal, would be, in fact, a withdrawal thereof,—an abandonment and dismissal of his appeal. In such case, if he alone had appealed, the district court would have no case before it for trial. That the receipt of the money was concealed would not change its effect upon the right of the landowner to appeal or to prosecute an appeal. It seems to us clear that, if the plaintiff did receive the award as alleged, then the case was not before the district court on his appeal. The defendant's right to appeal, and to prosecute its appeal, was entirely independent of the fact of whether or not plaintiff appealed or prosecuted his appeal. By its appeal, the defendant said, in effect, that it was not satisfied with the award, and demanded another trial on that issue. By the defendant's appeal the case was properly before the district court, and it had jurisdiction to try the same as it did. If the defendant alone had appealed, and the plaintiff had not received the money, there could be no question of the plaintiff's right to appear to the appeal, and to claim more than was awarded by the sheriff's jury. Now, while receiving the money as alleged bars the plaintiff of the right to appeal, we do not think it estops him from questioning the amount of recovery on defendant's appeal. The case as it stands lacks one element of estoppel, namely, that the defendant was induced to act to its prejudice by the conduct of the plaintiff in receiving the money and concealing that

fact. The defendant appealed, not because it was willing to allow the plaintiff the three hundred and seventy-five dollars, but because it was dissatisfied with that award as being too much, and with the hope of reducing the amount. Thus contending, the defendant would not have abandoned its appeal merely because the plaintiff was content to accept the award of three hundred and seventy-five dollars. We think the case was before the district court on defendant's appeal for trial *de novo*, and that the parties had the right to contest the amount of recovery on that trial. Defendant could not defeat the verdict and judgment by dismissing its appeal after they were rendered.

We have carefully examined the authorities cited by appellant's counsel, and do not think they are in conflict with the view we have expressed. In *Railway Co. v. Byington*, 14 Iowa, 572, it was held, as has since been enacted in the statute, that the landowner accepting the amount assessed is not thereafter entitled to appeal. In *Reichelt v. Seal*, 76 Iowa, 275 (41 N. W. Rep. 16), it was held that a party cannot enforce a judgment from which he has appealed, and at the same time maintain an appeal to set it aside; but, as we have seen, this case was before the district court on defendant's appeal. In *Corwin v. Railway Co.* (Kan. Sup.) 33 Pac. Rep. 99, it was held that accepting condemnation money cured certain irregularities in the proceeding. *Peterson v. Ferreby*, 30 Iowa, 327, holds that the right of the landowner to receive the money is suspended pending an appeal. *Trust Co. v. Harless* (Ind. Sup.) 29 N. E. Rep. 1062, is not in point, as that is under a statute which does not allow the contending party to enter upon the land and to appeal from the award at the same time, as may be done under our statute when the amount of the award is deposited

with the sheriff. Other cases cited seem to us equally inapplicable. Our conclusion is that the judgment of the district court is right, and it is, therefore, **AFFIRMED.**

G. W. BEGGS v. MATTHEW DULING, Appellant.

Party Wall: CONTRIBUTION. Under McClain's Code, section 8195, providing that, where a person builds a partition wall, the adjoining owner "may make it a wall in common by paying one-half of the appraised cost at the time of using it," the erection of a temporary shed, ten feet high and open on two sides, with one end of its batten roof resting on a 2x6 scantling, nailed to a two-story partition wall on the adjoining lot, is not such an appropriation of the wall as will charge the owner of the shed with contribution, or justify his grantee in assuming that such contribution has been paid, so as to entitle him to make permanent use of the partition wall without contributing to its cost.

Same. Under said statute, an appropriation of but five feet of a two-story partition wall ninety feet long, by the erection of a one-story stable, will not justify charging the owner of the stable with one-half of the cost of the entire wall.

MAXIMS. These statutes and this holding rest on the equitable principle that equality is equity, and that where there is equality in right, there should be equality of burden.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

SATURDAY, APRIL 10, 1897.

ACTION at law, to recover one-half the value of a party wall, erected by plaintiff, and thereafter used by the defendant. Defendant claims that he purchased the property occupied by him, after use had been made of the wall, without notice of any claim in plaintiff for the value thereof; and further pleads the statute of limitations. Trial to the court without a jury. Judgment for plaintiff, and defendant appeals.—*Affirmed.*

102	13
112	489
102	13
140	280
102	13
143	147

Eugene Lutz and W. G. Sears for appellant.

M. B. Davis for appellee.

DEEMER, J.—The parties to this controversy are the owners of adjacent lots. These lots are one hundred feet long. The lot now owned by appellant was formerly owned by one Bradley. Prior to the time plaintiff purchased his lot, Bradley had erected a two-story building covering the south fifty feet of his lot. In 1882, plaintiff constructed a brick building upon his lot, ninety feet long; the south fifty feet of which was of the same height as the Bradley building, and the north forty feet one story in height. As plaintiff used Bradley's west wall, he paid him one-half the cost thereof, as by statute provided. In May, 1884, plaintiff's building, having been destroyed by fire, was rebuilt, and the entire length of the building, to-wit, ninety feet, was made two stories high. In the year 1886, the Bradley building was used by the United States Express Company; and in order to shelter the wagons used by this company, Bradley's grantee, one Marks, constructed a shed north and to the rear of his building. This was built by nailing a plank to the partition wall, upon which a batten roof was placed; the south side being supported by the Bradley building, and the northeast corner by a post set in the ground. The roof slanted towards the east, and the sides of the shed to the north and east were left open. Later in the season, a brick stable one story high was built on the north end of the Bradley-Marks lot. This stable extended south so as to cover about five feet of the wall between the two lots. The shed occupied the space between the main building and the stable. Appellant purchased the Bradley property of Marks in March of the year 1890, and in the year 1892

removed the shed, and in its place erected a new structure, which is two stories high, and is designed for use as a photograph gallery. This last-named building was constructed by setting two posts on the east line of the lot at about equal distances from the main building and the brick stable, the posts being of the same height as the first story of plaintiff's building. On these posts was placed a plate 8x8 inches, extending from the old Bradley building to the stable. Resting on this plate were two cross timbers, the other ends of which were let into the wall built by plaintiff. These cross timbers carry the joists to which was nailed the floor of the second story of the building. The south ends of these joists were let into the main Bradley building, and the north ends rested on the brick stable. The second story of the gallery is supported by a truss resting in part upon iron rods passing through the cross timbers. The north and east sides of the second story of this building are built of brick, and the building is a permanent and substantial structure, although the first story has no floor, and is open to the east. This action is to recover one-half the appraised value of the north forty feet of the wall under and by virtue of the provisions of McClain's Code, sections 3194, 3195, which are as follows:

"Sec. 3194. In cities, towns and other places surveyed into building lots, the plats of which are recorded, he who is about to build contiguous to the land of his neighbor may, if there be no wall on the line between them, build a brick or stone wall, at least as high as the first story, if the whole thickness of such wall does not exceed eighteen inches, exclusive of the plastering, and rest the one-half of the same on his neighbor's land, but the latter shall not be compelled to contribute to the expense of said wall.

"Sec. 3195. If his neighbor be willing, and does contribute one-half of the expense of building such

wall, then it is a wall in common between them; and if he even refuses to contribute to the building of such wall, he shall yet retain the right of making it a wall in common by paying to the person who built it one-half of the appraised value at the time of using it."

Defendant does not claim that plaintiff has been paid for one-half the wall, but he insists that he bought his lot for a good and valuable consideration; that prior to the time of his purchase the wall had been used in common, and that he did not know, when he bought, that plaintiff had not been paid for half the wall, but believed that it had been paid for. He also says that the wall had been used in common for more than ten years prior to the beginning of this suit, and that plaintiff's action is barred. In the case of *Bertram v. Curtis*, 31 Iowa, 46, we said: "In the absence of any representations by the vendor of a vacant lot as to the ownership of a wall resting one-half thereon, the presumption of the law under our statute is that the ownership is in him who built it, or his grantees; for the builder had no legal right to demand, nor the owner of the vacant lot any obligations to pay for, the half resting on the vacant lot, until the owner of such lot shall use the same as a party wall, though he may do so, or join in building it; but in case the wall was so used by the owner of the lot, vacant when the wall was built, but now covered with a building resting therein, the presumption is that it belongs to the grantor of the lot, for prior thereto, and at the time of using it, the law devolved upon him the duty and obligation to pay therefor. In both cases the presumptions are in accord with the legal right and the reciprocal obligation." It is here contended that at the time appellant purchased the lot from Marks the wall was being used in common, and that defendant had the right to assume that the half had been paid for, or that plaintiff held the obligation of Marks to pay for

it, and that in either event he cannot rightfully be charged with any part of the value of the wall. On the other hand, appellee denies that the part of the wall for which he seeks compensation was being used in common at the time appellant purchased his lot; and says that the shed which was erected was a temporary structure, joined to the brick wall by spikes, and was of so slight and temporary a character that no one would be likely to suppose that the brick wall was being used in common. In order to determine the exact question at issue, we must look to the evidence relating to the character of the structure known as the shed. It is as follows: "The shed and stable were built to the north in 1886, and were open to the east side and north end. The batten roof on the one-story shed was attached to plaintiff's wall by a scantling 2x6, nailed to it in the brick wall; and was open on the east and north end, and was supported by a post on the east side. The shed was built first, the stable afterwards; and when the stable was built the shed was extended to the barn. The shed was used for our wagons, and the stable for our horses." "The shed was ten feet high on the east side, and the west, on plaintiff's wall, was one foot higher. The plaintiff's wall above the shed and stable was not used by the owner of defendant's lot. The northeast corner of this shed was supported by a post set in the ground. While we were there we had the barn built, and there was a vacant space with no shed over it, and Mr. Marks covered up the whole space with a shed." Now, in the case of *Zugenbuhler v. Gilliam*, 3 Iowa, 391, we said that, where the adjoining proprietor builds into a party wall which he did not contribute to the building of, and uses it, he makes it a party wall, and becomes liable to contribute to its cost. The statute in express terms says, that the neighbor may make a wall built under the provisions of McClain's Code,

section 3194, a party wall by paying to the person who built it one-half the appraised value at the time of using it. This statute is based upon the old equitable doctrine that equality is equity, and that where there is equality in right there should be equality of burden. Before a "neighbor" should be charged with the burden of a party wall, it must appear that he intended to make it a wall in common. If the use to which he puts it is of so slight and temporary a character as that it could not reasonably and fairly be said that he intended to appropriate and utilize the wall permanently, he should not be charged with the burden imposed by the statute. As used in this state, the word "use" has reference to the habitual or permanent employment of the means to the accomplishment of a purpose; and this purpose is the utilization of the standing wall as part of some permanent structure. Temporary or provisional utilization will not suffice to charge the adjoining owner; nor will such use justify a purchaser in assuming that all rights with reference to party walls between neighbors have been adjusted. The shed in question was a temporary and provisional structure, erected to answer passing needs, and, if attempt had been made to charge the adjacent owner for the half of the wall by reason of the use thereof in the erection of the shed, it would certainly have failed. See *Shaw v. Hichcock*, 119 Mass. 254; appeal of *Heimbach* (Pa. Sup.) 7 Atl. Rep. 737. When defendant erected the photograph gallery, he constructed a permanent building, and made such use of the wall as to indicate that he intended making it a wall in common, and he should be charged with one-half the appraised value of this north forty feet, less that part already in use by the brick stable. This, as we understand the record, is what the trial court did. It is insisted on behalf of appellant that, as soon as any part of the ninety foot

wall was used, a cause of action arose against the user for one-half of the appraised value of the whole wall; and that he, having purchased after this cause of action accrued, cannot be taxed with any part of the value of the wall. He further says that the statute of limitations bars plaintiff of all relief under such circumstances. The difficulty with this contention is that the first premise is not correct. Use of but five feet of the wall one story in height would certainly not justify the taxing of one-half of the value of the entire wall, ninety feet long, and two stories high, to the user of the small fraction of the wall; and use of fifty feet of the south end of the wall in common will not justify the conclusion that the whole wall is owned in common. As we find that no permanent use was made of the north forty feet of the wall, except that covered by the brick stable, until the year 1892, when the photograph gallery was erected, there is no occasion for determining when the statute of limitations began to run, for, in any event, the action is not barred. The conclusion arrived at in this case is not in conflict with the case of *Deere, Wells & Co. v. Weir-Shugart Co.*, 91 Iowa, 422 (59 N. W. Rep. 255). The decision in that case was made to turn upon the permanent character of the structure erected by the defendant, as well as upon the fact that the wall formed one side of the structure. It must be remembered that this is a law action, tried to the court without a jury, and that the question as to the character of the shed was one of fact. The conclusions arrived at by the learned district judge are so far supported by the evidence that we are not authorized to disturb the judgment founded thereon. The case of *Nolan v. Mendere* (Tex. Sup.) 14 S. W. Rep. 167, is in line with our conclusions. The judgment is **AFFIRMED**.

D. H. McGUIRE v. B. MONTROSS, Appellant.

Costs: SEVERAL ISSUES. A plea in mitigation in an action for slander in accusing plaintiff of stealing cattle, which alleges that his general reputation for more than ten years has been that he was in the habit of stealing cattle, does not present an issue within Code, section 2934, providing that where there are several "issues," plaintiff shall recover costs on the issues determined in his favor and defendant on the issues determined in his favor; and though defendant prevails, in a sense, on that plea, because the verdict for plaintiff is nominal, he cannot recover the fees of witnesses called solely on mitigation, if the general verdict goes against him.

SAME. Defendant charged with two slanderous utterances, lost as to one and prevailed as to the other. Testimony adduced applied to both, and it was impossible to separate the applicability. *Held*, defendant is not, by said statute, entitled to recover half the costs.

Appeal from Iowa District Court.—HON. M. J. WADE, Judge.

SATURDAY, APRIL 10, 1897.

ACTION to recover damages for slanderous words, alleged to have been spoken by the defendant of and concerning the plaintiff, accusing him of stealing cattle. The petition is in five counts, some alleging the speaking of the same words at different times, in the hearing of different persons, and others alleging the speaking of other words, at other times, in the hearing of other persons. The defendant answered each count, denying every allegation thereof, and to each pleaded as follows: "That at the present time, and for more than ten years last past, the general reputation and character of plaintiff in the community in which he resides, and resided during said time, is, and was, that he was in the habit of stealing cattle, and that he did steal cattle." On the trial, plaintiff

dismissed as to the first, fourth, and fifth counts of his petition, and the case was submitted to the jury on the second and third counts. The jury returned a verdict in favor of the plaintiff on the second count for one dollar, and in favor of the defendant on the third count. Defendant filed his motion, in eight different paragraphs,—the eighth being as an amendment,—to tax the costs mentioned in each to the plaintiff. This motion was sustained as to all the paragraphs except the fifth, seventh, and eighth, and overruled as to these, and judgment entered accordingly. Defendant appeals.—*Affirmed*.

Hedges & Rumble for appellant.

C. S. Lake for appellee.

GIVEN, J.—I. In the eighth paragraph of the motion, which is added as an amendment, the ground stated is that the witnesses named in the motion were called solely to the matter pleaded in mitigation, and that upon that issue the finding was for the
1 defendant. The plea in mitigation was denied by operation of law, and therefore formed an issue in the case, and it appears that the witnesses named were examined solely as to the reputation of the plaintiff for stealing cattle. The general rule is that “costs shall be recovered by the successful against the losing party.” Code, section 2933. In section 2934 it is provided: “And where there are several causes of action embraced in the same petition, or several issues, the plaintiff shall recover costs upon the issues determined in his favor, and the defendant shall recover costs upon the issues determined in his favor.” Appellant’s contention is that the issue upon his plea in mitigation to the second count of the petition was an issue within the meaning of said section 2934; that it

is apparent from the amount of the verdict for plaintiff that the jury found in his favor on that issue, and therefore he is entitled to recover said costs. He cites *Whitney v. Hackney*, 20 Iowa, 461. In that case the defendant at the trial changed the issue, thus rendering the testimony of witnesses summoned and in attendance immaterial. It was held proper for the court to tax a portion of the costs to the defendant, notwithstanding he was the successful party. *Arthur v. Funk*, 22 Iowa, 239, is also cited, wherein the defendant, being successful as to a part of his cross-demand, moved to tax the costs accrued in support of his claim against plaintiff, which motion was held to be properly overruled. Referring to section 3451 of the Revision of 1860, which is the same as said section 2934, the court said: "We agree with the appellee that this section has reference primarily to a case where the petition embraces several causes of action, or where there are several issues joined upon the matters therein alleged, or the new matter contained in the answer. And yet it may very consistently and reasonably include a case where the plaintiff recovers upon his demand, and the defendant, in whole or in part, upon his set-off, counter-claim, or cross-demand." In *Upson v. Fuller*, 43 Iowa, 409, also cited, the plaintiff sued to recover eighty dollars, the value of a gun left for repairs. Defendant averred that it had been sold by him for his charges. Judgment was rendered for plaintiff for thirty-one dollars, and forty-one dollars of the costs taxed to plaintiff and one dollar to defendant, which taxation was held to be erroneous. The court, referring to that part of section 2933 providing for an apportionment of costs in certain cases, says: "This provision is intended to apply to a case where the party's demand is composed of separate claims, and not where the demand is indivisible,—not based upon separate acts or contracts,—

which was the nature of the claim of plaintiff sued upon in this case. If the rule contended for by defendant prevailed, a plaintiff's case in a suit upon a contract or for a tort, or for the recovery of the value of property, would be a hard one. He cannot recover for more than he demands, and would be liable for costs if he recovered less. The law intends to impose no such hardship upon one seeking justice in the courts." In *Mielenz v. Quasdorf*, 68 Iowa, 727 (28 N. W. Rep. 41), cited, the court says: "The plaintiff contends that facts pleaded in mitigation do not constitute a defense, and so, as to them, there is no issue, within the meaning of the Code. To this we have to say that while, in one sense, facts pleaded in mitigation do not constitute a defense, yet as, under our Code (section 2682), facts relied upon for mitigation must be pleaded, to entitle the defendant to introduce evidence of them, it appears to us that we ought to regard the plea as tendering an issue." It was held that the court should have submitted this issue to the jury. This plea in mitigation of damages is not a separate claim from that of the plaintiff. While it is, in a sense, an issue in the case, and should be submitted it is not a set-off, counter-claim, or cross-demand. It is not a separate claim from that of plaintiff, but a part of it. It is not a defense, but goes only to the amount of recovery. It is no more an issue within the meaning of section 2934, than if it were an action to recover for the conversion of property, the value of which was in issue. We do not think the cases cited support appellant's contention, nor that the court erred in overruling the eighth paragraph of appellant's motion.

II. The seventh paragraph of defendant's motion asks that one-half of all the costs, except certain items designated, be taxed to plaintiff, "for the reason that two separate causes of action were submitted and

decided; that all of said costs applied as much to one
cause as to the other, plaintiff gaining the one,
2 and defendant the other." The second count
charges that on the twenty-first day of July,
1894, defendant said to A. M. Henderson, in the
hearing of others: "He (meaning plaintiff) has been
stealing cattle for ten years." The third count
charges the speaking of the same words on the eight-
eenth day of July, 1894, to L. J. White, in the hearing
of others. These are separate causes of action, and
the plaintiff was successful on one, and the defendant
on the other. Therefore, it is insisted that under said
section 2934 the costs should be divided. Appellant
says, in another connection, that this is not a case for
the apportionment of costs, but that they must be
taxed as provided in the statute; and yet this motion
is to apportion costs. If it be true that the testimony
of these witnesses applied to each of said causes of
action, it is not possible to say what of it was upon the
one, and what upon the other, and the general rule
that "costs shall be recovered by the successful against
the losing party" must control. We find no error in
either of the respects claimed, and the judgment is
therefore **AFFIRMED.**

102	25
108	737
102	25
128	391

ENGELHARDT HEMMI V. THE CHICAGO GREAT WESTERN
RAILWAY COMPANY AND THE CHICAGO, ST. PAUL
& KANSAS CITY RAILWAY COMPANY, Appel-
lants.

Setting Fires: RAILROADS: Evidence. That a fire originated from
1 sparks thrown by a locomotive, may be established by circumstan-
tial evidence.

SAME. A railroad company cannot be said, as a matter of law, to be
2 free from negligence where a fire is started by sparks from its
3 locomotive, although there was no fault in the engine or its man-
agement.

PRESUMPTION OF NEGLIGENCE: Jury Question. Under the rule that
2 proof of damage by fire set by an engine on a railroad is *prima*
3 *facie* evidence of negligence of the company, where such proof is
made, and evidence is introduced to show that there was no fault
in the engine or its management, a conflict arises on the issue of
negligence, which is to be determined by the jury.

New Trial: DRINKING BY JUROR. A new trial will not be granted
4 simply because some of the jurors drink beer while the trial was
in progress.

Appeal from Dubuque District Court.—HON. FRED
O'DONNELL, Judge.

SATURDAY, APRIL 10, 1897.

ACTION at law to recover damages resulting from
a fire set out by a locomotive while being operated on
defendant's line of road. Trial to a jury. Verdict
and judgment for plaintiff. Defendants appeal.—
Affirmed.

D. W. Lawler and Lyon & Lenahan for appellants.

Longueville & McCarthy for appellee.

DEEMER, J.—Plaintiff is the owner of one hundred and thirty acres of land in Dubuque county. Defendant's line of road runs through a portion of the land in a northeasterly and southwesterly direction, cutting the farm in two—except the northerly portion, which is bounded on the west by what is known as "Nutwood Park." Defendant's track runs immediately east of the park, and a steep and almost perpendicular bluff rises immediately east of the right of way, the rise in some places commencing on the right of way. The level space between the park and the bluff on plaintiff's land is almost wholly occupied by defendant's right of way. The main part of plaintiff's farm, including his improvements, is east of the railway track, and extends along the right of way for nearly a mile north and south. The bluff to which we have referred as lying east of the railway track was at the time in question covered with grass and a few straggling trees. On the day the fire occurred, defendant hastily started a wrecking train from its yards, which were south of plaintiff's farm, to go to the town of Kidder to remove a wreck from the track. The train ran north, passed the bluff to which reference has been made, and on about its mission. Shortly after it passed the bluff, fire was noticed in two or three places, two hundred and fifty or more feet apart, on the face of the bluff, by several witnesses who were inside the park. On account of a high wind which then prevailed, these fires spread rapidly over the face of the bluff, passed in a southeasterly direction, and finally reached the barn and other improvements belonging to plaintiff, which were situated on the top of the bluff, and totally consumed them. This action is to recover for the loss sustained.

The first point made by the appellant is, that the verdict is not sustained by the evidence. It is said,

that the record affirmatively shows that the fire was not set out by the passing engine, but by
1 tramps, who were in that vicinity at or about the time of the fire, or, if this be not true, that the evidence leaves the case in such condition that it is impossible for any one to tell whether the fire was caused by the engine, or by the act of some third party, and that for this reason, there should have been a verdict for the defendant. It is also contended that the evidence shows affirmatively, that there was no negligence on the part of the defendant with respect to its engine, or in the management thereof, and that the *prima facie* case made by plaintiff, conceding that he established the setting out of the fire by the defendant, has been fully and completely overcome. It is true, that no one saw the spark fall which set out the fire, and that the cause of the conflagration is left largely to inference. But the plaintiff proved such a state of facts as justified the jury in finding that the fire was set out by the defendant's engine. The fact that the locomotive passed the place but a few moments before the fire was seen, that two or three fires were set out simultaneously, that several witnesses who were in the vicinity saw the fire start at about the same time, that it spread very rapidly, and was carried by a high wind to plaintiff's improvements, and some other matters to which we need not refer, point almost unerringly to the fact that the fire was set out by the locomotive. It is true that the defendant offered evidence to show that other fires were set out in the vicinity earlier in the day by tramps or vagabonds; and that the jury might have concluded that plaintiff failed in its proof upon this point. It is manifestly a case where the evidence is conflicting, and with the finding of the

jury we cannot interfere. There are two circumstances in the case which point quite strongly to the correctness of the verdict. The fire occurred early in the afternoon, and a very strong wind had been blowing from the northwest nearly all day. The fires set out by the tramps were seen early in the morning, and were in such places that it was almost impossible for fire or sparks to be carried in the direction of the place where the fire was first seen in the afternoon. Moreover, the wind was blowing so hard that the fire, had it come from that set out by the tramps, would have reached the plaintiff's premises much earlier in the day than it did. It was but a few moments from the time it was first seen upon the bluff until it spread rapidly, and reached the plaintiff's improvements. Looking to the whole record, it seems to us that the jury was fully justified in finding as it did on this question of fact.

II. As to defendant's negligence, we have frequently held that proof of damage by fire is in such cases *prima facie* evidence of negligence, and that the railroad company, to avoid liability, must overcome this presumption; and this it can do only by negating every fact, the proof of which would justify a finding of negligence on its part. It follows, then, as said by this court in the case of *Greenfield v. Railroad Co.*, 83 Iowa, 270 (49 N. W. Rep. 95), that, if it be conceded there was no fault in the engine or its management, it cannot be said, as a matter of law, that the fire was not the result of negligence. But, if this were not the rule, the point relied upon by appellant is of no avail, for the reason that we have expressly held that in such cases there is a conflict in the evidence,—the *prima facie* case of negligence made by the plaintiff standing on one side of the issue, and the direct evidence of the defendant as to its care and diligence upon the other,—

and that it is the duty of the court to submit such conflict to the jury. *Babcock v. Railroad Co.*, 62 Iowa, 593 (13 N. W. Rep. 740, and 17 N. W. Rep. 909); *Id.*, 72 Iowa, 197 (28 N. W. Rep. 644, and 33 N. W. Rep. 628); *Greenfield v. Railroad Co.*, *supra*; *Hockstedler v. Railroad Co.*, 88 Iowa, 236 (55 N. W. Rep. 74). These rules to which we have called attention were sufficient to take the case to the jury, and to sustain the verdict, if there had been nothing but the presumption of negligence in plaintiff's favor. But we find on looking to the record that there was evidence to the effect that the spark arrester was not in good condition at the time of the fire. The engine was an old one, and it had been patched or repaired both before and shortly after the fire. These repairs were made so short a time after the conflagration as to justify the inference that the locomotive was not in good condition on the day in question.

III. Defendant asked instructions to the effect that the evidence in its behalf showed there was no negligence, and that a verdict should be returned in its favor. These instructions were refused, and we think properly so, for the reasons stated in the former part of this opinion.

IV. The twenty-ninth instruction, being a request made by the defendant, with certain modifications added by the court, is complained of. The instruction, as modified, is directly in line with the case of *Greenfield v. Railroad Co.*, and needs no further attention.

V. Other instructions are complained of in a general way. We have examined each and all with care, and find no error. They state the rule as it has been announced by this court many times, and clearly and distinctly apply it to the facts disclosed in evidence.

VI. One of the grounds for a new trial was misconduct on the part of the plaintiff's son, in treating

some of the jury during the progress of the trial. The alleged misconduct is not established. The two jurors who it is charged were the recipients of the son's favor,

deny the charge, and the court below was fully
4 justified in finding that it was not true. It is likely true that some of the jurors drank beer during the time the trial was in progress, and before the submission of the case, but this of itself is not sufficient to vitiate the verdict. *State v. Bruce*, 48 Iowa, 536; *State v. Livingston*, 64 Iowa, 560 (21 N. W. Rep. 34).

VII. Misconduct of plaintiff's counsel is another ground of complaint. Some of the remarks made by plaintiff's counsel were hardly justified by the record, but the court below immediately called him to order; and counsel retracted his statement, and made such explanation thereof to the jury as that no prejudice could possibly have resulted. At any rate, there was no such abuse of discretion in the trial court with reference to this matter as to justify us in interfering.

VIII. Certain rulings on the admission and rejection of testimony are complained of. We have examined them all, and with care, and discover no error.—

AFFIRMED.

102	31
110	28

102	31
118	597

THE NORWEGIAN PLOW COMPANY V. W. C. CLARK,
Sheriff, Appellant.

Sale or Bailment. / A contract between a manufacturer of goods and another person, giving the latter the privilege of selling goods in a certain territory and requiring him to obtain settlement for all goods at the time of delivery, either in cash or notes to be made payable to the manufacturer, and requiring him to turn over all cash and notes received by him to such manufacturer, and not permitting him to use any of the proceeds of sales until the manufacturer is paid in full, and authorizing him to sell goods at a reasonable profit and subject to a specified warranty, and in addition, requiring him to guarantee the sales of all goods shipped to him on his order by a time specified therein, and insure the fulfillment of the contract, and requiring him in order to fulfill the contract to advance, at the time of shipment, one-third of the agreed price thereof in cash, and to execute his notes for the balance, and providing for the giving a credit on his account at the end of the season for goods remaining on hand and accepted by the manufacturer, is a contract of sale, and not of bailment, and notes received by him as payee for goods sold by him are subject to levy for his debts, although the manufacturer has not been paid.

Appeal from Cerro Gordo District Court.—HON. PORTER
W. BURR, Judge.

SATURDAY, APRIL 10, 1897.

ACTION at law to recover the possession of seven promissory notes signed by various parties, and made payable to one John Bush. It is claimed that Bush took the notes as agent for the plaintiff, in the sale of agricultural implements. The defendant says he is entitled to the notes by virtue of the levy of an execution thereon as the property of John Bush; that the notes were in fact the property of Bush, or, if not his property, that he held title thereto under a conditional contract, which was not recorded, and of which neither he nor the execution plaintiff had notice or knowledge

at the time of the levy. Defendant further claims that the alleged agency of Bush is and was a mere pretense, and had existence only for the purpose of defeating and defrauding the creditors of Bush. On these issues the case was tried to the court, without a jury, resulting in a judgment for plaintiff and defendant appeals.—*Reversed*.

Blythe, Markley & Smith for appellant.

Richard Wilber for appellee.

DEEMER, J.—Appellee is a wholesale dealer in farm machinery at the city of Dubuque; and, at the time of the happening of the matters in controversy, Bush was a retail dealer in the same line of goods at Mason City. Bush had been buying goods of the appellee, in the regular way, for some fifteen years prior to 1893. In this last-named year he became insolvent, and a new arrangement was made between the parties, by written contract, to which reference will hereafter be made. The notes in controversy were taken by Bush during the year 1894. No written contract was made for that year, but the understanding was (to quote the language of appellee's agent), "that the same deal we had in 1893 should prevail in 1894." Bush also says that this was the arrangement. The written contract consists of two parts, the material parts of which are as follows: It first recites that appellee gives Bush the privilege of selling goods to the trade tributary to Mason City, and Bush agrees to do all the business pertaining to the sale of the goods, pay freight and charges against them, keep the same insured, pay taxes, keep them well housed and in good order, free of charge, and until sold or disposed of by order of first party. The next provision is an agreement on the

part of Bush to sell the appellee's goods exclusively, at a reasonable profit, and with an authorized warranty, making purchasers' obligations mature not later than December 1 of the year of sale. This is followed by a provision that Bush is to obtain settlement for all goods at time of delivery to purchasers, either by cash or notes, all notes to be payable to appellee, and to be secured so as to make them bankable; and, at any settlement between the parties, Bush was to furnish to appellee a full account of sales, and to turn over to appellee all cash, notes, or other proceeds of sale. Bush was not to retain or use any of the proceeds of the sales until appellee was paid in full. This is followed by a provision whereby Bush guaranteed the sale of all goods shipped him on his order under the contract, by the time specified in the annexed order, and, to insure the fulfillment of the contract, he further agreed to advance, at the time of such shipments, one-third the agreed price thereof in cash, and to execute his notes for the balance, or at his option, as an evidence of the indebtedness and of the price agreed upon, to execute his notes for the full value of the goods on the terms provided in an attached price list. And all the proceeds of sales and collections of purchasers' notes, less expense of collecting the same, were to be applied in payment of the unpaid balance of Bush's notes and accounts. It was further provided that Bush might take up his notes at any time by cash or farmers' notes taken for goods sold, and on such terms as the parties might agree upon, and with a guaranty thereafter provided. Bush also guaranteed the collection of all purchasers' notes and all renewals thereof, and a form of guaranty waiving demand is embodied in the contract. It was further agreed that appellee should have at all times the entire and exclusive control of all accounts, contracts, and other property accruing out of the sale of

the goods. Bush further agreed to hold all goods remaining on hand at the end of the season free of charge, but, if appellee should order their delivery, then Bush was to place same on board cars, and was entitled to a credit for their value upon his account. A further provision was to the effect that the goods should be held by Bush on special storage, and deposited as the property of appellee until converted into money or notes, as by the contract provided; and when so converted, the money and notes were to be held on special deposit for appellee, as collateral security to any indebtedness of Bush, either on notes given by him or guaranteed under the terms of the contract, and surrendered on order of appellee. A further condition was to the effect that Bush was to settle for all goods at such prices and on such terms as were stipulated in the order attached, which order was made a part of the contract, and all orders for goods were made subject to the approval of appellee. The order attached to this contract, and made a part of it by express reference, was in effect a request of appellee to manufacture and ship to Bush certain goods, for which he agreed, on shipment or demand, to give notes, payable at dates, and on conditions stated therein. Notes given for plows and other goods for spring trade were to mature July 1, and those given for goods sold for fall trade were to become due November 15. This provision was followed by a statement of certain discounts allowed for cash. By the next paragraph, Bush was to receive and keep the goods well stored and insured; and recapitulated certain other collateral agreements contained in the first paper, and further says that all goods on hand and the proceeds of sale of goods shipped shall be held for the exclusive use and benefit of appellee for their security until all Bush's obligation arising under the contract were completely fulfilled. It

was also agreed that all future orders should be subject to the terms and prices contained in the order, unless otherwise expressly agreed in writing. Appellee agreed to pay all expenses of collecting the notes. This order also contained these provisions: "No consignments made. No goods carried in the hands of customers. Consignees must look to carriers for all loss or damage to goods where same are shipped and receipted for in good order." This was followed by a long price list of the different kinds of goods manufactured by appellee. The contract proper was signed by both parties, and the order by Bush alone. Bush ordered many goods during the years 1893 and 1894, and in each instance an invoice was sent him, showing an ordinary sale of the goods. During the year 1894, and after appellee had shipped many goods to Bush on orders similar to the one quoted, it wrote him many letters, and from them we extract the following statements: "Your favor of * * * draft for \$60.06 received, for which please accept thanks." "We have a good deal of money to raise Monday. Rush all you can. Send here by Monday morning. We will allow you 5 per cent disc." "Received from John Bush the following notes, to be held as collateral to his account." "Received of John Bush the above-named notes, to be held by us, and any payments on same to be credited to his account. When settlement is complete, any notes remaining in our hands to be returned to John Bush." In November, 1893, appellee rendered a statement to Bush, showing total charges and credits. Among the credits was this item: "Farmers' notes as collateral, \$437.50." This account also showed a balance due from Bush of two hundred and sixty-two dollars and fifty cents. The oral testimony shows that Bush gave no notes for the goods shipped him under the contract above set out, and that he paid appellee for the goods as they were sold by him, and that the invoices to which we

have referred were upon the common form used by the company, whether they sold the goods direct, or shipped them on what are denominated "agency contracts." Appellee's agent, who made the contract, also testified that they made such instruments as the one referred to as security, and that they did not make them with people who were considered good.

This, in substance, is all the evidence upon which the case was decided, and appellant insists that the court erred in construing the contract to be one of bailment, and not of sale. This presents the principal question in the case, and to this claim we now turn our attention. It may be that the parties intended this to be a contract of agency, and not of sale; but their agreements, whatever the intention, were merged in the written instruments to which we have referred, and their respective rights and liabilities must be determined by reference to this contract, construed in the light of the surrounding circumstances. Appellant says that the rule by which to determine whether a contract is one of bailment or sale is this: "That if the identical thing is to be returned, even in an altered form, it is a bailment; but if the receiver is at liberty to return another thing, whether in the same or a different form, or to pay money at his option, it is a sale." This is the rule sometimes given in the books. *Vide* Brown, Bailm., p. 3; Benjamin, Sales (6th Ed.), p. 5; *Wright v. Barnard*, 89 Iowa, 166 (56 N. W. Rep. 424). And the supreme court of Illinois adopted this test in a case quite like the one at bar. See *Chickering v. Bastress*, 130 Ill. 206 (22 N. E. Rep. 542). Now, while this test is no doubt a good one in a certain class of cases, yet it is by no means certain in a case of this character. If this were the rule, it would do away with all that kind of bailments known as "consignments for sale," because there is no obligation in such a case to return the specific article, but

only the value thereof in money after a sale is made by the factor or consignee; or, in case no sale is made, then to restore the specific article. To arrive at a proper solution of the question, we must determine whether this contract created a mere bailment for the purpose of sale; or a sale on time; or with reservation of title until paid for, and therefore void, under our recording act (section 1922 of Code of 1873). If the contract is one of pure agency, providing for a consignment of goods to be paid for at a fixed price out of the proceeds of the goods when sold, then it is a bailment for sale, and the title remained in the appellee until the goods were sold to a *bona fide* purchaser for value. But if the contract is in form an agency contract, but really one of sale, made so for the purpose of evading the statute; or if it is in reality a contract of sale by which the consignee became in fact a purchaser, and was liable for the goods when sold, as the principal debtor, then the contract is one of sale. Benjamin, Sales (6th Ed.), p. 7; 3 Am. & Eng. Enc. Law, 340. One of the principal tests by which to determine this question is, was there a binding promise on the part of the consignee to pay for the goods? If there was such promise, the contract is ordinarily held to be one of sale, and not of bailment. *Bentley v. Snyder*, 101 Iowa, 1 (69 N. W. Rep. 1023.).

Great difficulty arises in applying these rules, and, as a consequence, there are numerous and conflicting decisions upon the subject. We will not undertake to review any considerable number of them, but will content ourselves with an effort to apply the principles above announced to the facts disclosed by this record. The contract, instead of being plain and simple, is long, indefinite, and somewhat obscure. It gives Bush the privilege of selling appellee's goods in a certain territory, provides that he shall obtain settlement for all goods at time of delivery, either in cash or notes (notes

to be payable to appellee), and that he shall turn over all cash and notes received by him to appellee. None of the proceeds of sales could rightfully be used by Bush until appellee was paid in full. Appellee was to have full control of accounts, contracts, etc., accruing out of sales, and goods were to remain the property of appellee until converted into money or notes, as provided by the contract; and the money and notes taken for the goods were to be held on special deposit by appellee as collateral security to any indebtedness of Bush, either on notes given or guarantied by him. Bush was to sell the goods at a reasonable profit, and subject to an authorized warranty, and make all purchasers' payments for the same due, not later than December 1 of the year of sale. Thus far the contract is purely one of consignment for sale. But, in addition to these provisions, we find that Bush guarantied the sale of all goods shipped him on his order by the time therein specified, and, to insure the fulfillment of this contract, agreed to advance, at the time of shipment, one-third of the agreed price thereof in cash, and to execute his notes for the balance, or at his option, as an evidence of the indebtedness and of the price agreed upon, to execute his notes for the full value thereof, on terms provided in the order and price list before referred to. It is true that all proceeds of sale and collections of purchasers' notes, less expenses of collection, were to be applied in payment of unpaid balance due upon the notes or unsettled accounts of Bush; but it was also provided that Bush might take up any of his notes, either by cash or by notes taken for machinery sold; but the taking of the notes in lieu of cash was to be upon such terms as might be agreed upon, and not as of right, and then only with an absolute guaranty on the part of Bush. The machinery remaining on hand at the end of the season, and accepted by appellee,

was to be credited on Bush's account. The money and notes taken by Bush were to be held on special deposit as collateral security for appellee to any indebtedness of Bush on either the original or guaranteed notes. Bush further agreed to settle for all goods at such prices and on such terms as are stipulated in the order which was made a part of the contract. In the order for the goods, Bush agreed to give his notes, payable at the dates and on the conditions therein stated; and this order further stated that the proceeds of all goods shipped should be held for the exclusive use and benefit of appellee as security, until all of Bush's obligations arising under the contract were fully complied with. Another condition of the order was the following: "No consignments made. No goods carried in the hands of customers. Consignee must look to carriers for all loss or damage to goods." Was there a promise on the part of Bush to pay for the goods shipped? It seems very clear to us that there was. It is true that this promise might be fulfilled by turning over cash or notes taken for machinery sold by him. But mutual agreement of the parties was necessary to a liquidation of Bush's obligations by these farmers' notes. The purchase price of the machinery was all charged to Bush; and it appears that if any remained at the end of the season, which appellee elected to receive back, Bush was to have credit for the invoice price thereof. The primary indebtedness was that of Bush, for the contract expressly says that the cash and notes received by him from sales of the goods were to be held as collateral security to his indebtedness to the company. Corroborative of this is the statement in the order that appellee made no consignments, carried no goods in the hands of customers, and that consignees should look to carriers for all losses or damage to goods. Again, the order says, "no goods to be returned without our order."

By the terms of the contract, Bush had the right to sell the goods at his own price, provided a reasonable profit was realized, and to appropriate any of the money or notes received by him for the goods after he had paid his obligations to the appellee. The only rational conclusion to be drawn from these provisions, it seems to us, is, that Bush purchased the goods upon credit, upon condition that he would devote the entire proceeds of all sales to the payment of the indebtedness created by the purchase. The invoices used by the appellee point strongly in this direction; and the further fact that appellee recognized Bush as its debtor, in all its correspondence subsequent to the making of the contract, is almost conclusive of the subject. The mere fact that the parties called the payment, by the execution of the notes required of Bush, an advance, is not of controlling importance. This term was evidently used to disguise the real transaction. Divested of all superfluities, the contract required Bush to become a purchaser of such goods as he might order, and the fact that it contains other undertakings, does not change its character.

One clause of this contract is almost identical with that construed in the case of *Plow Co. v. Braden*, 71 Iowa, 141 (32 N. W. Rep. 247). We held the contract in that case to be one of conditional sale, and not a bailment. See, also, *Wright v. Barnard*, *supra*; *Chickering v. Bastress*, 130 Ill. 206 (22 N. E. Rep. 542); *Machine Co. v. Holcomb*, 40 Iowa, 33; *Manufacturing Co. v. Johnson*, 97 Mich. 31 (56 N. W. Rep. 932); *Mack v. Tobacco Co.* (Neb.) 67 N. W. Rep. 174; *Kellam v. Brown*, 112 N. C. 451 (17 S. E. Rep. 416); *Manufacturing Co. v. Lyons*, 153 Ill. 427 (38 N. E. Rep. 661). Appellee relies upon the cases of *Budlong v. Cottrell*, 64 Iowa, 234 (20 N. W. Rep. 166); *Conable v. Lynch*, 45 Iowa, 84, and *Bayliss v. Davis*, 47 Iowa, 340. The first

case is clearly not in point. The theory of the court in construing the contract in that case was that it was to be fully executed by the parties at substantially one time, and that, until fully executed, neither the title to the property nor any right or interest therein passed to the consignee. Neither is the *Conable Case* authority for a doctrine contrary to that here announced. The controlling thought in that case was that the consignee should continue to sell the machines and property until August 1, 1875, as the agent of the plaintiff, and any that remained unsold at that date he was to take and pay for in notes or other valuable consideration. The consignee delivered some of the goods to a stranger in payment of his own debt before the first of August, and, in a contest between the consignor and the creditor, it was held that the consignor was entitled to recover, for the plain reason that at the time of the sale Berry was acting as agent for the consignor, and could not dispose of the property in payment of his own debts. The *Bayliss Case* is more nearly in point, but in that case the fact that the consignee advanced one-third of the value of the goods to the consignor, and gave his note for the balance, was not regarded as controlling, for the reason that he was to be repaid the advances from cash payments made by farmers to whom he might sell machines, and his notes were to be taken up and canceled by farmers' notes taken by him. It further appears that these farmers' notes were held at all times by the consignee as agent for his principal, and not as collateral security to an indebtedness owing by him to the consignor. The evidence adduced upon the trial was not before us in that case, and the decision was based solely upon the written contract. There are these further differences between that case and the one at bar: Thomas Stinson was expressly appointed agent, and his commission for the sale of machines was fixed. He was

to remit proceeds of sales as fast as received, "after deducting advances specified in contract;" and the notes given by him were to be taken up by exchanging "therefor farmers' notes taken for said machinery." In this case Bush's commission was not fixed. He was not required to remit proceeds of sales as fast as received, nor was he authorized to withhold cash to meet the advances made by him, nor could he as a matter of right, exchange farmers' notes for his own. He held the notes and cash received on special deposit for the appellee as collateral security to his indebtedness to the company on his notes. In one case the consignee had the absolute right to exchange farmers' notes for his own, and to pay his obligations (if such they may be called) from this particular fund. Moreover, this fund belonged at all times to the consignor. In the other he had no such right, and he held the fund as collateral security to the main indebtedness of the consignee for the goods. He did not have the right of exchange, and it was optional with the consignor as to whether it would accept farmers' notes in liquidation of the principal obligation. The consignee could not insist upon the payment of his obligation from the particular fund, and he was at liberty to pay his indebtedness at any time after it was due, and retain the money and notes received by him from sales of machinery. The cases are clearly distinguishable, and the case at bar is more nearly like that of *Plow Co. v. Braden, supra*, than any that have heretofore been decided in this court. Appellee says that the orders made by Bush should not be considered in construing the contract. To this proposition we cannot agree. The papers were made at the same time, and evidently as a part of one transaction. Moreover, each of the papers specifically refers to the other; and in the contract it is expressly provided that the order is a part thereof.

It is further suggested in argument, that as Bush made no advance payments upon the machinery, and did not give the notes called for by the contract, he should not be held to be a purchaser. To this, it may be said, that if he received the goods under the contract, he became the purchaser thereof, and the mere failure of the company to exact compliance with the contract by Bush, would not change the nature of the transaction. *Warder, Mitchell & Co. v. Hoover & Co.*, 51 Iowa, 491 (1 N. W. Rep. 795). The evidence affirmatively shows, that appellee regarded Bush as its debtor for the goods, for it sent him statements of account, in which it charged him with the machines, and credited him with cash, and with certain notes received, and also made mention that it held certain of them as collateral security to his account. If the contract is to be wholly disregarded, then it is clear, from the evidence adduced, that appellee is not entitled to recover. Bush said on the witness stand, that when he received goods from appellee, he knew the prices he was to pay for them, and that, when he sold them, he paid appellee a certain price agreed upon beforehand. If this be true, then the title passed as soon as he sold the goods to a purchaser, and the company held his obligation to pay for them at certain fixed prices. The notes attached in this case were for goods sold, and it is certain that the title to the goods passed to the purchaser. Bush was obligated to pay appellee for the goods so sold, at certain fixed prices, and might hold the notes as his own; or, to give the case the brightest aspect for appellee, Bush held the notes as collateral security for appellee to secure his indebtedness. If it be said appellee is entitled to the notes because of a lien thereon in virtue of the clause of the contract providing that they should be held as collateral to Bush's indebtedness, a ready answer is, that appellee alleged in its

petition, that it was the absolute and unqualified owner of the notes, and that Bush held them simply as agent. It could not recover on such a petition by evidence tending to show a qualified interest. *Kern v. Wilson*, 73 Iowa, 490 (35 N. W. Rep. 594); *Woolsey v. Williams*, 34 Iowa, 413.

Appellee insists that, as the case was tried to the court below as an action at law, we cannot interfere with its finding on questions of fact. Ordinarily this is true. But the construction of the contract was a question of law for the court, reviewable upon error; and not of fact, where all presumptions are in favor of the result reached. The contract is, it seems to us, one of sale, and not of bailment, although there is much language tending to show a "consignment for sale." But taking the instrument as a whole, and reading it in the light of the interpretation put upon it by the parties themselves, we think it clearly contemplates a delivery of the goods to the consignee, with a promise on his part to pay for them at certain fixed prices from any funds which he might see fit to use for that purpose.

It is unnecessary, in view of the conclusions reached, to pass upon appellant's claim of fraud in the transaction, although we may observe in passing that the obscurity of the language used may be attributed to a desire to mystify and perplex, so that appellee might call it a contract of agency or sale, as the circumstances seemed to demand.

Appellee appeals from an order of the court taxing certain costs to it. A decision of this question is uncalled for, in view of the conclusion reached in the former part of this opinion. For error in construing the contract, the judgment of the lower court is REVERSED.

GEORGE W. MATHEWS V. W. E. HERRON, *et al.*, Appellants.

102	45
137	144
102	45
141	753

Former Adjudication: REPLEVIN: *Landlord and tenant.* Judgment in replevin for plaintiff for the recovery of certain hotel furniture, claimed by him as head of a family, is not a bar to an action for the value of the use of similar furniture in the hotel, as to which defendant had wrongfully deprived plaintiff of the use.

Landlord and Tenant: INSTRUCTIONS. An instruction in an action by a tenant for eviction from a leased hotel before the expiration of his term, that the measure of damages is the difference between the agreed rent and the actual value of the premises, is not erroneous as not based on sufficient evidence, where it is shown that during the period in question the hotel was doing a good business which made its actual rental value greater than the agreed rent.

SAME. An instruction denying the right of a tenant who had been ousted from the leased premises before the expiration of his term, to recover the value of furniture put in by him, under the terms of the lease, to replace furniture which had worn out, is not inconsistent with another instruction that he would be entitled to recover for the use of such furniture for the period during which he was deprived thereof.

Books of Account: OBJECTIONS TO: *Appeal.* Where the objection to admission in evidence of books of account of an hotel keeper, to prove payment of certain cash items contained therein, is on the ground merely that proper preliminary proof was not made, the objection that cash items in books of account of one not a broker or banker cannot be thus proven, cannot be raised on appeal.

ON RE-HEARING.—SATURDAY, APRIL 10, 1897.

SAME Objection to an offer of an account book, and especially of certain pages thereof: "To which offer the defendants object as incompetent, immaterial, as to each and every item in said testimony, and to each and every item on the book, and on the pages referred to as incompetent and immaterial. The proper foundation has not been laid as for the introduction of the testimony offered,"—is merely an objection for want of proper foundation, and does not raise the point that certain items of cash payments therein shown were not admissible to show payments of notes involved.

SAME. An objection to the admission in evidence of certain books of account as incompetent and immaterial, "as to each and every

7 item" because the proper foundation has not been laid, is properly overruled where the proper foundation has been laid, and some of the items are competent.

Assignments of Error: ARGUMENT OF. Assignments of error not
1 argued will not be reviewed.

LADD, J., took no part in this case.

Appeal from Plymouth District Court.—HON. GEORGE
W. WAKEFIELD, Judge.

TUESDAY, MAY 19, 1896.

PLAINTIFF claims that on April 28, 1890, he was in possession of certain real estate in the town of Kingsley, Iowa, and the building situated thereon, and the furniture therein, under a lease to him from one Craig, of date October 5, 1886, and under a contract for the sale of the property, executed to Annie Mathews, plaintiff's wife, by the defendants; that on April 28, 1890, and when plaintiff had not failed in any respect to perform his part of said contract, said defendants forcibly and unlawfully ejected him from the premises, and converted to their own use all of plaintiff's personal property. In the first count of the petition ninety dollars per month is claimed as the rental value of the use of said premises during the time the defendants occupied the same, and three dollars per day on account of time lost by plaintiff before he could find other employment. In the second count of the petition plaintiff claims one thousand dollars on account of the conversion to their use by defendants of the furniture in the hotel on said land, and in the third count one thousand five hundred dollars is claimed as the difference in value of the hotel and furniture on April 28, 1890, and upon the date of the execution of the contract to Annie Mathews. Exemplary damages are also claimed. The defendants claim that plaintiff and his wife requested

them to purchase of Craig the real and personal property in controversy, and to procure from him an assignment of the lease executed by Craig to Mathews, so that Annie Mathews might purchase the property. The plaintiff released to defendant all his interest in said property, and they conveyed the same to Annie Mathews upon certain terms and conditions, and thereafter plaintiff knowingly permitted defendants to deal with her as the absolute owner of the property. They therefore claim that plaintiff is estopped from now claiming any interest therein. Defendants also claim that, on April 28, 1890, they made an oral agreement with Annie Mathews, whereby the contract of sale was canceled, and possession of the property delivered to defendants. They plead that all of the causes of action relied upon by the plaintiff have been adjudicated in a former action. The cause was tried to a jury, and a general verdict returned for plaintiff for seven hundred and sixty-three dollars and four cents. The jury specially found for plaintiff in the sum of three hundred and twelve dollars and four cents on the first count of the petition, and the sum of one dollar as exemplary damages. On the third count of the petition they found for plaintiff in the sum of four hundred and fifty dollars. Whereupon, after being further instructed, they retired and again returned with the same general verdict, and special findings for plaintiff as follows: On the first count seven hundred and sixty-one dollars and four cents, on the second count one dollar, and on the third count one dollar. Judgment was entered upon the verdict, from which this appeal is taken.—*Affirmed.*

Argo, McDuffie & Reichmann for appellants.

Struble Bros. & Hart and *J. U. Sammis* for appellee.

KINNE, J.—I. Some of the assignments of error are merely stated in appellants' brief,—not argued. These will not, therefore, be considered. It is said the court erred, in the sixth division of its charge, 1 in submitting to the jury the matter of the difference between the amount of rent agreed to be paid by plaintiff, under his lease from Craig, from April 28, 1890, to November 1, 1891, and the actual rental value of the property, because there was no evidence touching that matter. Without 2 entering into a discussion of the evidence as to this matter, we may say that, although it was not as definite in this particular as it should have been, we think it was sufficient to warrant the submission of the question to the jury. It clearly showed the rental value at the time defendants took possession of the premises, and the form of the question may be construed to call for such value during the period from April 28, 1890, to November 1, 1891, though not so expressed in terms. Besides, it appears, from letters of the defendants in evidence, that the hotel was well filled with guests, and, as the letters say, it was "having a big run" during a portion, at least, of the period mentioned. It is also shown that it had been doing about the same business for two years prior to April 30, 1890. Under such circumstances it is fair to presume that, in the absence of a showing to the contrary, the rental value after April 28, 1890, would not be less than it was shown to be at that date, if we treat the evidence as limited to that date. Furthermore, defendants introduced evidence of value of such use of the property, and the witness Higgins testified to having paid seventy-five dollars per month therefor for some time after June, 1890. Clearly, there was evidence to justify the giving of the instruction.

II. Error is also assigned upon the giving of the sixth paragraph of the court's charge, wherein he directed the jury to find the reasonable value of the use of said hotel and furniture from April 28, 3 1890, to November 1, 1891. It is urged that plaintiff's rights as to said furniture, had already been adjudicated, and he had been paid for whatever interest he had in said furniture, and it is claimed that paragraph 7 of the court's charge, is in conflict with paragraph 6. Construing these instructions together, there is no conflict, when the facts to which they are applicable, are considered. The second count of the petition charged the conversion of certain furniture by defendants, and sought to recover its value. As to that, the court instructed that there could be no recovery. Under paragraph 6, recovery was permitted for the value of the use of the hotel and furniture. Defendants plead that the furniture put into the hotel, by Mathews, after the execution of the lease with Craig, was no more than an equivalent for articles of furniture in the house when the lease was made, and which were thereafter worn out or 4 destroyed. By the terms of the lease, Mathews agreed to keep and return the original furniture in as good repair as the same was at the time the lease was executed, or make an equivalent therefor. It therefore appears, that this furniture is to be treated as a substitute for other furniture which had become worn out or destroyed. In legal effect, then, it was the same as the old furniture, subject to the rights of the parties under the lease, which gave the plaintiff the right to its use. If, then, the defendants 5 deprived plaintiff of such use, they were liable. In the replevin case, in which it is claimed plaintiff's rights to the furniture were adjudicated, certain furniture was claimed by him as the head of a family. That case did not determine

the right of possession to, or use of other property of the same class in the hotel. Instruction 6 permits recovery for use of furniture, while instruction 7 denies recovery for the value of certain furniture. Plaintiff, as we have seen, was, under the lease, entitled to the use of the furniture, and that in no wise conflicts with paragraph 6 of the charge.

III. It is said the court erred in admitting in evidence certain pages of plaintiff's book of accounts. The argument is that the book was offered and admitted for the purpose of proving the payment of certain notes, and claim is made that cash items in a book account of one not a broker or banker cannot be thus proven. By turning to the record we discover that the real objection made to this book was that proper preliminary proof had not been made to permit its admission. The objection now made, as we read the record, was not then made, nor does it appear to have been called to the attention of the trial court. We cannot, therefore, consider it.

IV. Claim is made that the verdict is contrary to the evidence. There is much conflict in the evidence, but we cannot say that it did not warrant the finding of the jury. Upon the whole record we discover no error, and the judgment below is **AFFIRMED**.

SUPPLEMENTAL OPINION ON RE-HEARING.

SATURDAY, APRIL 10, 1897.

PER CURIAM.—We were induced to grant a re-hearing in this case because of a claim that in the foregoing opinion we had misapprehended the record, in declining to consider an assignment of error based on the admission of certain books of account in evidence, as shown by the third division of the opinion. In arguing the assignment on the

former submission, as well as now, the objection urged to the books of account was that they were allowed in evidence to show the payment of the notes involved in the suit, by cash payments therein shown, which could not be done by books of account. It will be seen, by a reference to the former opinion, that we then thought the objection to the books as evidence went only to the foundation laid for their introduction, so that the objections urged in argument could not be considered. The doubts created by the petition for re-hearing led us to open that question for further consideration, and to give it more particular notice. We are still of our former opinion, as to the import of the objection, taken as a whole, with perhaps the modification that we should determine whether the reference to items is sufficiently definite to warrant us in considering the particular question urged in argument. The offer was of the book, and especially certain pages thereof. The objection was as follows: "To which offer the defendants object as incompetent, immaterial, as to each and every item in said testimony, and to each and every item on the book and on the pages referred to as incompetent and immaterial. The proper foundation has not been laid for the introduction of the testimony offered." It will be seen that the objection is just as applicable to any other as to cash items. The court could not know from the objection that it meant any particular item, or any particular class of items. Had it sustained the objection, it would have excluded the book, and the last words of the objection indicate that such was the purpose. The objection states no more to us than that the items were objected to as incompetent and immaterial because no proper foundation was laid for their admission. There is no claim made now that the proper foundation was not laid for the book, if the items were proper matters to be

proven in that way. Some items in the book in question were proper for such proof. In such a case, if the purpose is merely to exclude particular items, the book may be properly admitted, and the objection should specify the items particularly, or by classification. When such books are offered, with a proper showing, they stand, in an important sense, as a witness or a deposition offered. If competent to give evidence of any fact, the objection should be to the offer of the objectionable evidence and not to the witness. When the objection was made to include each and every item, if sustained it would have excluded proper evidence, and that would have been error. It was not the duty of the court to sift out so as to save a ruling from error, but the objector should so present his objection that a favorable ruling would be free from error. With the proper foundation laid (and we think it was), if the book contained any items competent to be shown by it (and we think it did), then it was properly admitted, subject to objections to items, if any, that could not be so proven. No such objections were made in this case, and there was no error in the ruling. We adhere to our former conclusion, and the judgment will stand **AFFIRMED**.

LADD, J., took no part in this case.

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA

AT
DES MOINES, MAY TERM, A. D. 1897,
AND IN THE FIFTY-FIRST YEAR OF THE STATE.

CATHERINE WINTERS, Proponent, v. JOHN C. WINTERS,
Contestant, Appellant.

Privileged Communication: WILL CONTESTS: *Attending physician.*

- 4 On probate of a will, the contesting heir at law, as well as the devisee or the executor, may examine the testator's attending
- 5 physician in respect to information acquired in his professional capacity, though Code, section 3643, prohibits the disclosure of such information unless the party for whose benefit the prohibition is made waives his rights thereunder. It would, however, remain discretionary to exclude such testimony if it tended to blacken the memory of the dead.

Objections to Deposition. Objection to the deposition of a physician

- 1 on the ground that it reveals confidential communications, go to the competency of the evidence, not to the witness, and hence
- 3 may be made for the first time at the trial, under Code, section 3751, requiring objections other than for "incompetency or

(58)

102	53
107	999
107	930
112	59
4110	483
102	53
111	364
102	53
116	600
102	53
120	343
102	53
137	423
102	53
142	263

irrelevancy" to be made at the taking of the deposition. *Greedy v. McGee*, 55 Iowa, 750, *overruled*.

Appeal: SKELETON BILL OF EXCEPTIONS. A skeleton bill of exceptions directing the clerk to insert the depositions or oral testimony
2 "as shown by the minutes of the shorthand reporter," sufficiently identifies a deposition, where the reporter's minutes, clearly identifying it and duly certified, are on file; such minutes becoming a part of the record without an order.

Appeal from Henry District Court.—HON. H. C. TRAVERSE, Judge.

TUESDAY, MAY 11, 1897.

M. F. WINTERS died January 21, 1895. He left, him surviving, his widow, Catherine Winters, and his brother and only heir, John C. Winters. The widow offered for probate a paper purporting to be his last will, leaving to her all his property, and naming her as executrix without bond. The brother filed objections thereto, alleging want of testamentary capacity and the exercise of undue influence. There was a trial to jury, verdict and judgment for proponent, and contestant appeals.—*Reversed*.

Babb & Withrow and *Blake & Blake* for appellant.

McCoid & Finley and *T. M. McAdam* for appellee.

LADD, J.—The will in controversy bears date January 2, 1895, nineteen days prior to the death of Winters. For some weeks previous to December 24 preceding his death, he had been at Hot Springs, Ark., and while there was treated for his ailments by A. F. Sanders, a practicing physician of that place. The contestant took the deposition of this doctor, and when he offered to read it in evidence, the proponent objected to the interrogatories as incompetent. This

objection was sustained by the court, and the testimony of the witness excluded. No objection
1 was made at the time of the taking of the deposition, and no written motion or exception with reference thereto filed. The only questions argued relate to the exclusion of this evidence.

I. The appellee moves to strike from the abstract that part containing the deposition of Sanders on the ground that the same is not identified in the skeleton bill of exceptions. Such bill directs the clerk
2 to insert the depositions or oral testimony "as shown by the minutes of the shorthand reporter taken upon said hearing." This refers to the evidence with sufficient certainty. *Yount v. Carney*, 91 Iowa, 559 (60 N. W. Rep. 114). The evidence was taken down in shorthand by the official stenographer, and, after its introduction, was immediately certified as required by law, filed, and thereby became a part of the record. No order therefor was necessary. *Bunyan v. Loftus*, 90 Iowa, 124 (57 N. W. Rep. 635). The notes of the reporter clearly identify this deposition. The errors on the admission or the exclusion of evidence were, therefore, properly preserved. *Fleming v. Stearns*, 79 Iowa, 258 (44 N. W. Rep. 376); *Hood v. Railway Co.*, 95 Iowa, 331 (64 N. W. Rep. 261). Only two assignments of error are argued, and appellee urges that these are not specifically stated. They are stated, however, with as much particularity as the circumstances of the case will permit.

II. To the interrogatories in the deposition of Sanders, concerning the condition of the deceased, and his opinion of his mental condition, derived while acting as his physician, the objection of incompetency was urged and sustained. It is insisted
3 that this ruling was erroneous, because made for the first time at the trial. No exceptions to depositions other than for incompetency or irrelevancy

can be regarded unless made by motion before the case is reached for trial. Code, section 3751. The objection of incompetency, without more, goes to the evidence, and not to the witness. *White v. Smith*, 54 Iowa, 233 (6 N. W. Rep. 284); *Ball v. Railway Co.*, 74 Iowa, 132 (37 N. W. Rep. 110). Where the witness is made by the statute incompetent to testify at all, objection must be made when he is sworn. *Watson v. Riskamire*, 45 Iowa, 231. In *Burton v. Baldwin*, 61 Iowa, 283 (16 N. W. Rep. 110), it is held that objection to the testimony of a witness to personal transactions, or communications, prohibited by section 3639 of the Code, is timely if made during the trial. This section is so similar to section 3643 of the Code that the ruling must control in this case. It seems to be there held that if the witness is only prohibited from testifying with respect to some particular matter, but is otherwise competent, then the objection on the ground of incompetency may be urged at the time the deposition is offered in evidence. While the opinion in *Burton v. Baldwin* does not refer to the ruling in *Greedy v. McGee*, 55 Iowa, 759 (8 N. W. Rep. 651), the latter must be regarded as overruled. It follows that the objection was made in apt time.

III. The important question in this case is, whether the deposition of Dr. Sanders may be received in evidence, when offered by the contestant. Section 3643 of the Code, is as follows: "No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination shall be allowed in giving testimony to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice and discipline. Such prohibitions shall not apply to cases where the party in whose favor the same are made waives the

right conferred." On the authority of *Denning v. Butcher*, 91 Iowa, 425 (59 N. W. Rep. 69), this
4 evidence, if offered by the proponent, should have been received, though no executor had been appointed. Ought it to be rejected when offered by an heir at law? At common law, confidential communications to a physician, were not privileged, and they are only so made by statute. Those to an attorney, however, were privileged, and it was held that the attorney might not divulge without the consent of the client while living, but that, after his death, in a contest between a stranger and an heir, devisee, or personal representative, the latter might waive the privilege and examine the attorney concerning the confidential communications, though the stranger was not permitted to do so; and, in a controversy between heirs at law, devisees, and personal representatives, the claim that the communication was privileged could not be urged, because, in such a case, the proceedings were not adverse to the estate, and the interest of the deceased, as well as of the estate, was, that the truth be ascertained. *Hageman*, Privil. Com., section 84; *Russell v. Jackson*, 9 Hare, 387; *In re Layman's Will*, 40 Minn. 371 (42 N. W. Rep. 286); *Scott v. Harris*, 113 Ill. 451; *Doherty v. O'Callaghan*, 157 Mass. 90 (31 N. E. Rep. 726); *Blackburn v. Crawfords*, 3 Wall. 175.

Does the statute change the common-law rule with reference to attorneys, or only extend it so as to include other professions? The authorities bearing on this question are conflicting, though not numerous. Under a statute requiring the privilege to be "expressly waived by the patient," the court of appeals of New York held that the seal of secrecy remains forever unless removed by the patient himself. *Westover v. Insurance Co.* (N. Y.) 1 N. E. Rep. 104; *Renihan v. Dennin*, 103 N. Y. 573 (9 N. E. Rep. 320). This ruling

was contrary to the practice followed in that state for many years. (*Allen v. Public Administrator*, 1 Bradf. Sur. 221), and the legislature amended the statute in 1893, allowing the privilege to be waived by executor, surviving husband, widow, heir at law, or next of kin in a proceeding to probate the will of the patient. The supreme court of Indiana seems to have followed the cases cited in excluding the evidence when offered by the heir at law. *Heuston v. Simpson*, 115 Ind. 62 (17 N. E. Rep. 261). It is held otherwise in *Morris v. Morris* (Ind. Sup.) 21 N. E. Rep. 918, where the court permitted the administrator with the will annexed to call the attending physician as a witness, saying "he was the representative of the testator, and was seeking to maintain his will, and had the right, we think, as such representative, to call the attending physician who attended the testator in his last illness to prove the condition of his mind at the time the will was executed." *In re Flint's Estate* (Cal.) 34 Pac. Rep. 863, it is held that the privilege cannot be waived by an heir at law in a contest with the devisee. These decisions are based on the ground that the executor or devisee represents the deceased, and the evidence is offered to sustain the will, which it is the policy of the law to maintain. The particular vice in the reasoning in these cases, in making the distinction between the heir at law and the devisee, is the assumption that the paper in dispute is the will of the deceased. The statutes are for the benefit of the patient while living and of his estate when dead. The very purpose of the contest is to determine whether the deceased in fact made a will, who shall be his representative, and who is entitled to his estate. If he did not have testamentary capacity, then the paper was not his will, and it is not the policy of the law to maintain such an instrument. It is undoubtedly the policy of the law to uphold the

testamentary disposition of property, but not until it is ascertained whether such a disposition has been made. The same presumptions are indulged in favor of the validity of the will as of other written instruments. The paramount purpose in the first instance should be to ascertain whether the instrument presented is in fact the will of the deceased. And no one can be said to represent the deceased in that contest, for he could only be interested in having the truth ascertained, and his estate can only be protected by establishing or defeating the instrument as the truth so ascertained may require. The testimony of the attending physician is usually reliable, and often controlling, and to place it at the disposal of one party to such a proceeding and withhold it from the other would be

5 manifestly partial and unjust. Such testimony, ordinarily, relates to the capacity of the deceased, and could rarely be perverted to the injury of character. Should it ever be necessary, the court might well, in its discretion, prevent blackening the memory of the dead. The language of the statute quoted indicates no intention on the part of the legislature to change the common-law rule with reference to confidential communications to attorneys, and it is difficult to understand why the rule of exclusion should apply in the case of a physician and not of an attorney. The statute places both on the same ground. As said in *Denning v. Butcher*, *supra*: "The settled practice in this state has been to receive the testimony of the attending physician touching the testator's physical and mental condition at and prior to the time of the execution of the will; and unless the reasons are obvious and urgent, and a proper construction of the statute requires it, no rule should be established which will set aside a practice long recognized as proper and necessary."

It is not very material to the result whether we say the heir or devisee may, in the interest of the estate of the deceased, waive the privilege, or that the statute does not apply to a case where the proceedings are not adverse to the estate, and the interest of the deceased as well as his estate could only be the determination of the truth. In either event we hold that in a dispute between the devisee or legal representative and the heirs at law, all claiming under the deceased, the attending physician may be called as a witness by either party. *Thompson v. Ish*, 99 Mo. 160 (12 S. W. Rep. 510).—REVERSED.

THE FRED MILLER BREWING COMPANY, Appellant, v. W.
M. STEVENS, *et al.*

Contract Against Public Policy: AGENT'S BOND: *Liquor laws.*

Where a foreign brewing company, in 1892, had an agency in Iowa for the sale of liquors therein, in the original packages, and neither the company nor its agent had any authority to sell liquors as required by the statutes of such state, a bond executed in Iowa and delivered and accepted in Wisconsin and given by the agent to the company to account for the proceeds of the liquors sold, was void, under Code, section 1550, providing that all securities, etc., made in whole or in part for or on account of the intoxicating liquors so sold in violation of "this chapter" shall be void, etc., and act of congress, August 8, 1890, making liquors transported into any state, etc., for sale therein in original packages, subject to the laws of such state, etc., to the same extent as liquors produced therein.

LADD, J., took no part in this case.

Appeal from Woodbury District Court.—HON. SCOTT M.
LADD, Judge.

TUESDAY, MAY 11, 1897.

THE defendants are sureties on a bond made by one C. E. Dennis to the plaintiff company. The cause was submitted to the court, without a jury, on a

stipulation of facts, as follows: "(1) That plaintiff is, and at all times in the pleadings mentioned was, a corporation duly chartered and organized under the laws of the state of Wisconsin, having its chief office at Milwaukee, in said state, and its business was the manufacture of beer and other rye products of a brewery, and that the plant for said manufacture and brewing was and is situated at Milwaukee, in the state of Wisconsin. Said plaintiff conducts a very large business, and sells its products throughout the United States, including the state of Iowa, in which last-named state plaintiff's beers have a good reputation for purity and wholesomeness, and the demand therefor is large. The same is true of the state of Nebraska and South Dakota. (2) That, for the more convenient handling and dispatch of a part of its said business, plaintiff established a depot and agency at Sioux City, Woodbury county, Iowa, for the handling of its trade in said city and county, as well as in contiguous territory, in the states of Nebraska and South Dakota. (3) That plaintiff, for said purpose, maintained at Sioux City a refrigerator warehouse, having the facility of its own side track, and also wagons and teams for making local deliveries in Sioux City and short distances therefrom, in the states of Nebraska and South Dakota. (4) That said depot or warehouse and agency were in charge of an agent to whom goods were shipped in barrels, half barrels, quarter barrels, eighth barrels, and sixteenth barrels, in wood, and also in pint and quart bottles, the bottles being in cases of two or more dozen bottles to a case, and also packed in barrels of several dozen bottles per barrel. The sale of the goods did not carry the title to the barrels, packages, bottles, etc., in which the goods were shipped and delivered; but such packages, bottles, etc., remained the property of, and were to be returned to plaintiff. (5) That plaintiff's goods were

sold and delivered to customers, both retailers and private individuals, in Iowa, Nebraska, and South Dakota, from said depot and agency, in the same barrels, halves, quarters, eighths, and sixteenths, and the bottled goods in cases or barrels, as the same were packed for shipment, in Wisconsin, and received at the depot at Sioux City. When goods desired by such customers were not in stock at the depot, orders therefor were taken, and the same were subsequently shipped from Wisconsin, and delivered through the same depot and agency. (6) That the agent at Sioux City took orders for goods, delivered the same, and was personally responsible for the safe return of all packages, bottles, cases, etc.; and it was a part of his duty to gather up the packages when empty, whether barrels, halves, quarters, etc., or bottles in cases and barrels, and return them to plaintiff at Milwaukee, aforesaid; and for that purpose he had under him the necessary porters, drivers, and laborers, and said agent also received the cash, paid all purchases, and was required to collect all accounts for goods sold, where cash was not paid therefor, on the delivery thereof. He paid the expenses of the agency out of such moneys, and was required to render periodical accounts to plaintiff, and remit the balance from time to time. (7) That on the sixteenth day of April, 1892, plaintiff employed Charles E. Dennis as its agent, to conduct its said business at Sioux City, Iowa, and, to enable the said Charles E. Dennis to secure the said employment, the defendants united with him in the execution of the bond, a copy whereof is attached to the petition as a part thereof, marked 'Exhibit A.' That said bond was executed by said obligors therein, and sent to, and accepted by plaintiff at Milwaukee, and said Dennis was duly installed in said agency in pursuance thereof. (8) That said agency was terminated on the first day of August,

1893, and upon that day there was due from said Dennis to plaintiff, for moneys collected and not accounted for, which said moneys were the proceeds of beer sold and delivered from said agency between the sixteenth day of April, 1892, and August 1, 1893, packages not returned, and other properties not delivered up, returned, or accounted for, the sum of seven hundred and forty-five and sixty-nine hundredths dollars (\$745.69), a true statement and account whereof is attached to the petition as a part thereof, marked 'Exhibit B.' (9) That all the goods sold during the agency of said Charles E. Dennis was beer, which, under the construction of the statutes of the state of Iowa, is an intoxicating beverage." The district court dismissed the petition, and the plaintiff appealed.—*Affirmed.*

Kean & Sherman for appellant.

Swan, Lawrence & Swan for appellees.

GRANGER, J.—This case turns on the question of the validity of the bond on which the action is based. If the bond is void, it is because of a provision of section 1550 of the Code, as follows: "All sales, transfers, conveyances, mortgages, liens, attachments, pledges, and securities of every kind, which either in whole or in part shall have been made for or on account of the intoxicating liquors sold in violation of this chapter, shall be utterly null and void against all persons in all cases, and no rights of any kind shall be acquired thereby, and no action of any kind shall be maintained in any court in this state for intoxicating liquors or the value thereof, sold in any other state or country, contrary to the law of said state or country, or with intent to enable any person to violate any provision of this chapter, nor shall any action be

maintained for the recovery or possession of any intoxicating liquor, or the value thereof, except in cases where persons owning or possessing such liquor with lawful intent, may have been legally deprived of the same." Assuming, for the moment, a state of facts to leave out of consideration all questions as to interstate commerce,—as, that the liquors were originally produced and owned in Iowa, by the plaintiff, and put upon the market, as shown by the stipulation of facts,—there would, we think, be no contention but that the bond would be void under the provision of the statute quoted, because it is a security, in whole or in part, made on account of intoxicating liquors, sold in violation of the chapter of which the section is a part, and it is therein provided in terms that no action shall be maintained for the possession or value of such liquors. This action is to recover the value of liquors, in part at least, and the bond is a security on which recovery is sought. These assumed facts will enable us to better understand how the situation is affected by the actual facts, because of the liquor being shipped from Wisconsin, and of the purpose and manner of its sale in Iowa. For the purposes of the case, at least, we think it may be said that the stipulated facts bring the case within the rule of *Leisy v. Hardin*, 135 U. S. 100 (10 Sup. Ct. Rep. 681), and other cases wherein the rule is announced that imported liquors are protected from the operations of our law, prohibiting their introduction into the state, until the property has passed the line of foreign commerce, and become a part of the general mass of property in the state, which we may understand to be when the importer has so placed it by a sale in the original package. It will be remembered that this bond was executed in April, 1892, and the transactions under it were of a later date. August 8, 1890, what is known as the "Wilson Act," passed congress, and became a law. It provides

as follows: "That all fermented, distilled or other intoxicating liquors, or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The Wilson Act was under consideration in the case of *In re Rahrer*, 140 U. S. 545 (11 Sup. Ct. Rep. 865), and in that case the question of how the case of *Leisy v. Hardin* affected the legislative acts of this state, therein considered, which were held to be repugnant to a constitutional provision of the United States, was considered, and, after stating the grounds on which the case was reversed, it is said: "This is far from holding that the statutes in question were absolutely void, in whole or in part, and as if they had never been enacted. On the contrary, the decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the state." By this we understand that the laws of the state, as they might operate on or affect commerce between the states, were limited in their operation by the constitution and laws of the general government, without impairing their force to operate under all conditions when not thus limited; that is, as the subject of commerce between the states is one exclusively of congressional control, existing state enactments become operative or inoperative, to conform to congressional regulations on the subject. A state law of to-day, in harmony with congressional regulations, may become limited in its operations by a congressional change in the future; and a state law of to-day, limited in its scope by

congressional regulations, may, by such changes, be relieved of such limitation, and be operative to the extent of the legislative purpose. In the *Leisy-Hardin Case* it is held that the absence of congressional legislation on the particular subject of such interstate commerce is taken as a declaration against restriction of such commerce by the states, and hence, in so far as our law affected such commerce, its operation was limited. The limitation then extended to a denial of the right to interfere with liquors brought within the state until it should, by a sale or in some other manner, become mingled with and become a part of the general property of the state. The Wilson Act so far changes the congressional regulations on the subject as to make such liquors subject to the operation of the state laws upon their arrival in the state. The effect of the act is to make such liquors, upon their arrival, a part of the general property of the state for the purpose of the operation of the state law.

With these general propositions settled, we may notice some particular claims of appellant. The laws as to which the liquors are made subject by the terms of the Wilson Act are those of a police nature, and it is said such laws have never been called into action, by which is meant that the laws have never been invoked as to the liquors, and it is said that some sales of liquors are lawful. We do not think such to be legitimate inquiries. As we said at the outset, this action is on the bond, and the inquiry is, is it valid? If not, it is because it was void at its inception. The bond shows that it was to be a security for the acts of Dennis in the sale of liquors. There is no pretense of a permit or authority to sell the liquors in Iowa. The sales were presumably in violation of law, and intended to be so. *State v. Cloughly*, 73 Iowa, 626 (35 N. W. Rep. 652). Nothing in the stipulation of facts shows the sales intended by the bond, or made, in pursuance

of it, to have been legal. The bond is plainly for the protection of plaintiff in its operations in violation of the laws of the state.

It is said that the bond is of itself an act of interstate commerce, in that it was "executed in Sioux City, Iowa, sent to, delivered, and accepted in, Milwaukee, Wisconsin." We are hardly willing to believe that counsel mean that the manner of execution—because the bond was, in its preparation and completion—passed between two states—made it a matter of interstate commerce, so that its validity cannot be questioned in a state court. The state law in no manner attempts to regulate those matters. We think it makes no difference how or where the bond was executed. It was a contract to be performed in Iowa, and so intended. It is, to all intents and purposes, a contract in violation of Iowa laws, and its enforcement is sought in Iowa.

This cause was submitted in January, 1897. On the first day of March, 1897, the supreme court of the United States handed down its opinion in the case of *Allgeyer v. State of Louisiana*, which is reported in 17 Sup. Ct. Rep. 427, and our attention has been called to it since the opinion in this case was prepared. It is thought that the case sustains appellant's view, but we think it strongly supports our conclusion in both its reasoning and citations. The question involved is entirely different from the one in this case. The rule of that case is that, notwithstanding the law of the state of Louisiana to the contrary, a citizen of that state, or a person therein, has the right to contract with a corporation outside that state for insurance on his property in that state, where the contract is both made and to be performed outside the state; and that a person within the state may, to effect such insurance, write a letter or notification to the company because of which the insurance attaches. It is held

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that to deny to a citizen that right is violative of the fourteenth amendment to the constitution of the United States, in that it deprives him of his liberty without due process of law, because, as therein stated, "the liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or vocation; and, for that purpose, to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." As showing the application of the constitutional rights, as defined, we further quote from the case as follows: "The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. *Milliken v. Pratt*, 125 Mass. 374; *Tilden v. Blair*, 21 Wall. 241. The contract in this case was thus made. It was a valid contract, made outside the state, to be performed outside the state, although the subject was property temporarily within the state. As the contract was valid in the place where it was made, and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification, in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do the act, and to give the notification within the limits of the state, any prohibition of the state statute to the contrary notwithstanding." There is no possibility of bringing the facts of this case within that rule. Call the contract

or bond an Iowa or a Wisconsin contract, and it still remains that it was to be performed in Iowa, and in violation of its laws. The judgment of the district court is right, and it is **AFFIRMED**.

LADD, J., took no part in this case.

B. F. HEINS, Appellant, v. GEORGE A. LINCOLN, as Mayor of the City of Cedar Rapids, Iowa, *et al.*

Municipal Debts: CONSTITUTIONAL LAW: Refunding. The issuance
5 by a city of long time interest bearing bonds in payment of its current debts evidenced by city warrants, is not authorized by a provision in the city charter authorizing a city council to "borrow money for any object or purpose in their discretion and to pledge the faith of the city for the payment thereof," and also authorizing it to levy taxes for the payment of such warrants. *Sioux City v. Weare* 59 Iowa, 98, distinguished and explained.

SAME. An ordinance by a city whose indebtedness exceeds the constitutional limit, authorizing the issuance and selling of bonds, putting the cash in the treasury and thereafter redeeming old bonds therewith, is void, as authorizing the creation of a debt beyond the constitutional limit.

SAME: Exchange. Where a city seeks to refund outstanding bonds,
8 and its debt has reached the constitutional limit, it may, by a proper resolution, without increasing its debt, place the refunding bonds, properly executed, in the hands of a trustee, with power to deliver new bonds when the old bonds have been delivered to the trustee and cancelled.

RESOLUTIONS: Mayor. A resolution by a city council providing for
4 the exchange of new bonds of the city for old bonds and outstanding warrants is invalid unless signed by the mayor or passed over his veto, under Acts Twentieth General Assembly, chapter 192, section 1, providing that the mayor shall sign every resolution passed by any city of the first and second classes, before it takes effect.

Refunding Bonds: CONSTRUCTION OF STATUTE. Acts Seventeenth General Assembly, chapter 58, provides for refunding bonded
1 indebtedness and requires an annual tax to pay interest and part of the principal. It was made applicable to cities under special

NOTE.—On the question of what constitutes an indebtedness of a municipality within the meaning of restrictions thereon, see note to *Beard v. Hopkinsville* (Ky.) 23 L. R. A. 402.

102	69
106	630
102	69
111	42
111	112
102	69
112	302
102	69
119	428
102	69
121	738
102	69
129	330
102	69
131	546
102	69
136	196
136	487

charters, by Acts Eighteenth General Assembly, chapter 140. Acts Twenty-second General Assembly, chapter 19, paragraphs 1, 7, provide that cities under special charter may refund debts "evidenced by bonds heretofore issued and outstanding," and that the power conferred by said acts of the Seventeenth General Assembly shall not be impaired. *Held*, refunding bonds could, in turn, be refunded, though the requirement of Acts Seventeenth General Assembly, as to levying a tax, had not been complied with.

Appeal from Linn District Court.—HON. WILLIAM P. WOLF, Judge.

TUESDAY, MAY 11, 1897.

THIS is an action in equity to restrain the issuance of bonds by the city of Cedar Rapids. The defendants are the mayor, the finance committee of the city council, the city council, the city treasurer, and the city itself. The city proposed to issue two series of bonds, each bond to be for one thousand dollars, and to draw four and one-half per cent. interest, payable semi-annually. All of the bonds were to mature in twenty years. The first issue was of twenty thousand dollars of refunding bonds, to refund refunding bonds outstanding. The second issue was of sixty-eight thousand dollars of warrant bonds, for funding outstanding general warrants of said city. The constitutional limit of indebtedness of said city is one hundred and ninety-seven thousand, three hundred and seventeen dollars and ten cents, and the city is already indebted in excess of said limit. The pleadings are voluminous, but the contentions of the parties may be briefly stated as follows: *First*. Appellant claims both bond issues are void, in that they create an indebtedness in excess of the constitutional limit. *Second*. That the law was violated, because the bonds were not sold to the highest bidder. *Third*. That the resolution under which the bonds were sold is void, it not having been signed by the

mayor. As to the issue of twenty thousand dollars in bonds, it is also claimed that the resolution authorizing their sale was contrary to, and in violation of, an ordinance of the city, and that there is no authority to issue refunding bonds to take up or pay off refunding bonds. The sixty-eight thousand dollar issue of bonds is also claimed to be void, because not authorized by the city charter. The defendants claim, that the refunding bonds will not create any additional debt; that they simply take the place of outstanding bonds. They deny that the bonds were to be sold to Roberts & Co., or that they are invalid; aver that the warrant bonds were issued under and by virtue of power given by an ordinance of the city, and a favorable vote of the people; that they are to be exchanged for outstanding city warrants, and the debt will not be increased. The court, at the conclusion of the trial, found that the bonds were, in all respects, legal, denied an injunction, and dismissed the plaintiff's bill at his costs. Plaintiff appeals.—*Reversed.*

Lewis Heins for appellant.

Warren Harman and *J. J. Powell* for appellees.

KINNE, C. J.—I. It conclusively appears from the record in this case that the city of Cedar Rapids was, when the bonds in controversy were proposed to be issued, as well as when this case was tried below, indebted far in excess of the limit fixed by the constitution of the state. If, therefore, the bonds created an additional indebtedness they were void. We first turn our attention to the contention of appellant that refunding bonds cannot be issued to take up refunding bonds. It is conceded that the bonds to be taken up by the twenty thousand dollar issue were refunding bonds previously issued to refund other bonds. It

is to be remembered that the city of Cedar Rapids is acting under a special charter. Chapter 19 of
1 the Twenty-second General Assembly provides:

"Section 1. That all cities in this state having a population of more than two thousand, organized and existing under special charters, are hereby authorized and empowered if, by a vote of two-thirds of the city council, it be deemed for the public interests to refund the indebtedness of any such city evidenced by the bonds thereof, heretofore issued, and outstanding at the time of the passage of this act and to issue the coupon bonds of such city in denominations of not less than one hundred dollars and not more than one thousand dollars, and having not more than twenty years to run, redeemable in lawful money of the United States at maturity and bearing interest payable semi-annually at a rate not exceeding six per cent. per annum." Section 2 provides the form of such bonds. Section 3 provides how the bonds shall be sold, and that they may be exchanged for "outstanding bonds, par for par." Section 7 provides that nothing in the act shall impair or interfere with the powers conferred by chapter 58 of the Laws of the Seventeenth General Assembly, as amended by chapter 140 of the Laws of the Eighteenth General Assembly. Chapter 140, Acts of the Eighteenth General Assembly, made chapter 58, Acts of the Seventeenth General Assembly, applicable to cities acting under special charters. The latter chapter provided for refunding the bonded debt of cities, and provided that the city council should assess and levy each year on the taxable property of the city a sum sufficient to pay the interest on such bonds and a certain portion of the principal, and that the fund arising from such levies should be used only for the purpose of paying the bonds and interest. It was under that law that the bonds of the

city of Cedar Rapids were refunded which it is now proposed to refund by this twenty thousand dollar issue of bonds. It will be noticed that the provisions of the Acts of the Twenty-second General Assembly, heretofore quoted, do not, in terms, undertake to limit the right to refund to bonds which have never been refunded. No case is cited which would justify us in holding that a statute which expressly empowers a city to fund its debt or bonds, and which does not undertake to limit such right or power, applies only to bonds which have not already once been refunded. We discover nothing in the Acts of the Twenty-second General Assembly which warrants such a construction. It appears that the city council never complied with the Acts of the Seventeenth General Assembly in levying a tax, and keeping it solely for the purpose of paying the principal and interest on the bonds. It had a general sinking fund, which has been exhausted except a few thousand dollars. We do not think that because the city council violated the law in failing to levy and collect the tax provided for to pay the interest and principal of the bonds that the city is now precluded from refunding these bonds. We conclude, therefore, that the power to issue refunding bonds under the Acts of the Twenty-second General Assembly is not limited to bonds which have not before been refunded.

II. Were the bonds void as creating a debt in excess of the constitutional limit? Without now discussing the question of the power of the council to issue bonds to take up city warrants, but assuming that such power exists, we cannot see how it can be said that either issue of bonds increased the
2 debt of the city. The council passed ordinances providing for the issuance and sale of the bonds. The bonds were to be sold, and the proceeds paid into the city treasury. After this was done, the treasurer was

to publish a notice to the holders of the bonds to be redeemed to present the same for payment. Now, if the bonds had been in fact issued under these ordinances, they would have been clearly void, because, after they had been sold, and before the old bonds had been called in, the indebtedness of the city would have been increased in the amount of the new bonds issued. *Doon District Township v. Cummins*, 12 Sup. Ct. Rep. 220. But these bonds in controversy were not issued under said ordinances. The provisions of the ordinances as to selling the bonds, putting the cash in the treasury, and thereafter redeeming the old bonds, could not be carried out without increasing the city debt beyond the constitutional limit, and

3 were, therefore, void. Thereafter the city council adopted a resolution providing for the exchange of the new bonds for the old bonds, and of the warrant bonds for the outstanding warrants; and to effectuate said exchange the council appointed the First National Bank, of Norwich, Conn., as the agent of the city, and placed all of said bonds, duly executed, in the hands of its said agent, in trust, with power to deliver new bonds when the old bonds had been delivered to it and canceled, and to deliver warrant bonds when the warrants had been delivered to it. This trust was duly accepted by said bank. Under this arrangement the new bonds created no obligation against the city until the same were delivered by the trustee, which delivery was not to take place until the old bonds or warrants were received by it and canceled. We do not see how any plan of exchange could be devised which would better protect the city, and at the same time create no additional debt.

III. It is said that the resolution is of no effect because the same was not signed by the mayor. The statute provides that the mayor shall sign every resolution passed by any city of the first and second

classes before such resolution shall take effect or be in force. Acts Twentieth General Assembly, chapter 192, section 1; Acts Twenty-second General Assembly, chapter 2, section 1. This same chapter 192, Acts Twentieth General Assembly, provides that if the mayor shall refuse to sign any such resolution after it has passed the council, he shall call a meeting of the council, and return the resolution to it, with his reasons for refusing to sign the resolution; and under such circumstances it only becomes effective if passed

by the council over his veto by a two-thirds
4 vote. This requirement of the law that the mayor shall sign the resolutions of the council before they shall take effect is evidently intended to be mandatory. It is designed as a check upon hasty or unwise action of the council, and we do not see how the fact that the city had delivered the bonds to its trustee, who had receipted for the same, can be held to avoid the necessity for a strict compliance with this mandatory provision of the statute. While, therefore the exchange of bonds might have been effected in the manner proposed under such a resolution properly passed, and signed by the mayor, and such an exchange would not have increased the indebtedness of the city, but simply changed its form, still such a resolution, not signed by the mayor, was without effect, and did not authorize the council to effect such exchange thereunder. Inasmuch as the sale of the bonds as provided for in the ordinance would increase the debt beyond the constitutional limit, such provisions were void, and, as the resolution was not signed as required by law, no exchange of the bonds could be made thereunder.

IV. Appellant insists that the city had no power to issue its bonds to pay or redeem its outstanding general warrants. In view of what we have already said, that the city had no power to act under the

unsigned resolution, we might pass the question now presented, because its determination is not essential to a disposition of this appeal. As, however, the question is one of great importance, and may arise again in the further progress of this action, it is
5 proper that we now decide it. The right to issue this sixty-eight thousand dollars in bonds is claimed to be given by section 54 of the charter of the city. That section provides: "The city council is hereby authorized to borrow money for any object or purpose in their discretion, and to pledge the faith of the city for the payment thereof, provided the question of borrowing is first submitted to the legal and qualified voters of the city and notice of a length of time, as in city elections, being first given, stating the manner and object of the loan, and if a majority decide in favor of said loan, then the city council shall by ordinance establish a sinking fund to provide the means to pay any indebtedness created by virtue of the authority granted in this section." Acting under this section, the city council submitted to the electors of the city the question as to whether the city should issue twenty-year bonds in the sum of sixty-eight thousand dollars, to bear not to exceed five per cent. interest, payable semi-annually, for the purpose of funding its floating debt; and the proposal received the indorsement of a large majority of the electors at the polls. It is proper to say that it is admitted that the sixty-eight thousand dollars in city warrants which are proposed to be taken up constitute in all respects a legal indebtedness against the city. The real question is, does this section confer on the city the right to pay its current debts, which are evidenced by city warrants, by issuing long-time interest-bearing bonds therefor? The section, it will be observed, is, in its phraseology, unlimited as to the purposes for which money may be borrowed, and the faith of the city

pledged in payment thereof. The council is, by its terms, vested with the discretion of determining the necessity for the loan, and whether or not the purpose is a proper one. Nevertheless, there is a limit to the power thus granted, and the language is to be construed as giving power to borrow money only for legitimate corporate purposes. Nor is the power given in express terms, to issue bonds for the money so borrowed. Municipal corporations possess, and can exercise, only the following powers: *First*, those granted in express words; *second*, those necessarily or fairly implied, or incident to the powers expressly granted; *third*, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Such are the rules laid down by Judge Dillon in his excellent work on Municipal Corporations, and they are undoubtedly correct. Dillon, Mun. Corp., section 89; *Merriam v. Moody's Executors*, 25 Iowa, 163; *Keokuk v. Scroggs*, 39 Iowa, 447; *Hanger v. City of Des Moines*, 52 Iowa, 193 (2 N. W. Rep. 1105); *Clark v. City of Des Moines*, 19 Iowa, 199; *Brockman v. City of Creston*, 79 Iowa, 587 (44 N. W. Rep. 822); *Becker v. Keokuk Water-Works*, 79 Iowa, 419 (44 N. W. Rep. 694). As we have seen, no power to issue bonds has been expressly granted by said section. Is such power necessarily or fairly implied in or incident to the powers expressly granted? The section implies nothing touching the issuance of bonds. The provision touching the creation of a sinking fund as well applies to an ordinary loan as to a loan to be evidenced by negotiable bonds. Is the power to issue bonds indispensable to effectuate the purposes and objects of the corporation? Manifestly, not so. This same city charter makes provision for the levying and collection of taxes not exceeding one per cent. in any one year upon all property within the city, subject to taxation. It appears

from the record that, if the city had availed itself of this provision of its charter, it could have paid off this sixty-eight thousand dollars of warrants inside of two years. The legislature had, by conferring the power of taxation on the city, provided the means by which its current obligations might be met. Again, we do not understand that the power to borrow money vested in a municipal corporation authorizes such corporation to issue bonds in payment therefor, in the absence of express authority to that effect. We know that some courts have so held, but we are not prepared to assent to the correctness of such holdings. As is said in *Merrill v. Monticello*, 138 U. S. 673 (11 Sup. Ct. Rep. 441): "It does not follow that, because the town of Monticello had the right to contract a loan, it had, therefore, the right to issue negotiable bonds, and put them on the market as evidences of such loan. To borrow money and to give a bond or obligation therefor, which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in legal effect, essentially different transactions. * * *

Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such a loan. Nor can such power be implied because the existence of it is not necessary to carry out any of the purposes of the municipality." So, in the case at bar, no express power is given to issue bonds, and none can be implied, because it is not necessary to carry out the objects and purposes of the municipality. *Clark v. City of Des Moines*, 19 Iowa, 199; *Dively v. City of Cedar Falls*, 21 Iowa, 569; *Williamson v. City of Keokuk*, 44 Iowa, 88. It is a familiar rule that all doubts as to the existence of authority of a municipal corporation to do an act must be resolved against it. *Brockman v. City of Creston*, 79 Iowa, 587 (44 N. W. Rep. 822); *Becker v. Keokuk Water-Works*, 79 Iowa,

419 (44 N. W. Rep. 694). Some language used in the case of *City of Sioux City v. Weare*, 59 Iowa, 98 (12 N. W. Rep. 786), may seem to conflict with the views herein expressed, but the facts in that case are different; nor do we think the court intended to adopt the broad rule that, if a municipal corporation had the power to borrow money, it would necessarily follow that it had the power to issue its negotiable bonds therefor, in the absence of express authority so to do. The policy of the law requires that, whenever it is practicable or possible, the current expenses of such corporations shall be paid by the levy of taxes; and, while the section of the charter under consideration vests in the city power to borrow money for proper city purposes, it would, we think, be a forced construction to say that it was ever intended thereby to empower the city to postpone the payment of its ordinary current expenses, evidenced by its warrants, for a period of twenty years, and to issue bonds therefor. We do not doubt the right of the city, under the power conferred by this section, to, in cases of emergency, borrow money to discharge even its current expenses, but we do not think it does, or was intended to, authorize it to go to the extent of postponing the payment of its current expenses for a long period of time and to issue its bonds therefor. If this may be done, there is nothing in the way of the city's borrowing money and issuing long-time bonds in payment of all its usual general expenses; and such a course might be followed year after year, without let or hindrance, save when the constitutional limit of debt would be exceeded. The views we have expressed find support in the fact that wherever it has been deemed necessary that such corporations should have the power to issue bonds, express statute authority to that effect has been given by the legislature. Even if such power exists in this case, it must be because

it is necessary to effectuate the objects and purposes of the municipality; and we have attempted to show that no such necessity existed, as the city possessed ample power, under other sections of its charter, to levy taxes, and pay the warrants in controversy. In any view of the case, it seems to us that the city had no power or authority to issue these bonds for the purpose of taking up this sixty-eight thousand dollars in city warrants. Its power is not to be determined from the fact that it might be convenient so to do, but it is a question of necessity in the proper exercise of other powers expressly granted. No such necessity existed. In passing, it may properly be said that the general current expenses of such municipalities should be paid out of taxes levied for that purpose, and it is not the policy of the law to permit a long time bonded debt to be created therefor, which shall be a burden upon posterity. The same policy may not apply to those extensive and permanent improvements which will benefit those who may live after the present generation shall have passed away. We have fully considered all questions which are material to this controversy, in view of the conclusions we have reached. For the reasons heretofore given, the district court erred in refusing an injunction, and in dismissing the plaintiff's bill at his costs.—REVERSED.

IN THE MATTER OF THE ESTATE OF ENGLEBERT PICKENBROCK, R. F. JORDAN, Appellant.

Advancements. Testator signed notes as surety for his son, with the understanding that, if compelled to pay same, the amount should be deducted from the son's share of the estate. Some of the notes were paid by testator, who kept them as memoranda, and others were paid by his administrator. *Held*, that the sums so paid were advancements.

Appeal from Polk District Court.—HON. C. P. HOLMES, Judge.

TUESDAY, MAY 11, 1897.

W. A. PICKENBROCK, administrator, filed his application, showing as follows: That deceased left as his only heirs Amelia Pickenbrock, his widow, Emma Reynold, Gus W. Pickenbrock, Nettie McCauley, and W. A. Pickenbrock; that the estate is nearly ready to close; that the administrator has sold certain real estate, and that, when all the money is paid thereon, there will be three thousand five hundred dollars to distribute, and that the share of each child will be about six hundred dollars; that deceased had advanced to and on behalf of Gus W. Pickenbrock sums of money largely in excess of his share in the estate, which sums were so advanced, deceased intending them as advances; and that the same should be deducted and set off from and against the share of Gus W. Pickenbrock in his estate. Petitioner asks an order directing him to distribute the funds to the widow and children other than said Gus, and a finding that said Gus W. Pickenbrock has no interest in the assets in the hands of the administrator. Appellant, Jordan, filed his answer, denying that said Gus

W. Pickenbrock has no interest in the estate, or in the funds in the hands of the administrator. He alleges, that he is the owner and holder of a judgment for four hundred dollars against Gus W. Pickenbrock; that after the death of Englebert Pickenbrock, appellant procured an attachment against the interest of said Gus W. Pickenbrock, in certain lands described; that on the fourteenth day of November, 1893, a judgment and order for special execution were granted to appellant; that said real estate was sold by order of the court, by the administrator "without in any wise affecting the rights or the interest of the appellant in the judgment aforesaid." Appellant asks that his judgment be declared a special lien upon the funds in the hands of the administrator that would be going to said Gus W. Pickenbrock, and that the court order the same to be paid upon said judgment. The court found that advancements had been made to Gus W. Pickenbrock, in an amount equal to, or exceeding that shown due to him, in the hands of the administrator, and ordered the administrator to distribute the funds in his hands without requiring him to pay the judgment of the appellant; and from this order R. F. Jordan appeals.—*Affirmed.*

Jordan & Brockett for appellant.

Cummins & Wright for appellee.

GIVEN, J.—I. The facts are, in substance, as follows: Englebert Pickenbrock and his sons, W. A. and Gus W. Pickenbrock, executed their promissory note to the Polk County Savings Bank for a loan of four hundred and fifty dollars, Gus W. receiving the money so borrowed. Gus W. Pickenbrock kept the interest paid for one year, and paid fifty dollars on the principal. The note was renewed at ninety days after date

by Englebert and W. A. Pickenbrock. Gus W. Pickenbrock, being absent, did not sign the renewal. It was afterwards renewed from time to time, but whether Gus W. joined in the renewals does not appear. The administrator paid four hundred and forty-eight dollars and two cents in satisfaction of the note as an approved claim against the estate. Englebert Pickenbrock also went on a note with Gus to the Valley Bank for a loan of two hundred dollars, Gus receiving the money. This note Englebert Pickenbrock paid prior to his death. Also upon a note for two hundred dollars to the Savings Bank of Iowa, and on another note for two hundred dollars to the People's Bank, Gus receiving the money in each instance. The administrator paid two hundred and twenty-three dollars and forty-seven cents in satisfaction of the note to the Savings Bank. The note to the People's Bank was secured by collaterals given by Englebert Pickenbrock, out of which the People's Bank realized payment of the note. The testimony shows that each of these transactions was for the benefit of Gus W. Pickenbrock, and that Englebert Pickenbrock signed the notes as security only. Gus testifies: "Father went my security for the note [referring to the \$450 note], and he says I should pay the note if I could, and if I didn't pay it, and he had to take the note up, it should be taken out of my share of the estate." In speaking of all the notes, he further states: "When these notes were signed, he said that if I didn't pay the money back, and he had to take the notes up, it was to be taken from my share of the estate." On cross-examination he says, with respect to the four hundred and fifty dollar note, "The understanding was that the debt was mine, and that I would have to pay it." In answer to the question, "Did he loan it to you, then?" he answered: "Yes, sir. I expected to pay it back; and he says, 'If you don't pay

this,—if I have to pay this,—it will be taken out of your part of the estate.’ I agreed to pay the note if I could. The agreement was that I was to pay off this note at the bank if I could. * * * The understanding was that he was surety for me.” The only other evidence bearing upon the question of advancement is that of W. A. Pickenbrock, that his father said that all the money that was advanced to any of the children should be taken out of their shares. Also the testimony of Mr. Carroll Wright that deceased had said to him that he had advanced to Gus very much more money than was his proper share of the estate, and that this money that he had paid, or was liable for, he wanted taken out of Gus’ share; that it was an advance. The testimony of W. A. Pickenbrock and Mr. Wright is objected to upon the ground that the declarations testified to were not made in the presence and hearing of Gus Pickenbrock. Whether or not the objection is well taken, we need not determine, as the uncontradicted evidence of Gus Pickenbrock shows beyond doubt that at the time the notes were given it was the intention of the deceased, agreed to by Gus Pickenbrock, that whatever deceased, or his estate, should have to pay on said notes, would stand as an advancement to Gus; hence the result must be the same whether or not that evidence is admitted.

II. We now inquire whether the transactions shown in the evidence constitute an advancement to G. W. Pickenbrock to the extent of the money paid for him by the deceased before his death, or by the administrator since. “An advancement is a gift, by anticipation, from a parent to the child, of the whole or a part of what is supposed such child would inherit on the death of the parent.” *McMahill v. McMahon*, 69 Iowa, 118 (28 N. W. Rep. 471). “It is nothing more or less than an irrevocable gift made by the parent to the child in anticipation of such child’s future share of

the estate." *In re Estate of Lyon*, 70 Iowa, 381 (30 N. W. Rep. 644). See, also, *High's Appeal*, 21 Pa. St. 287. In 2 Woerner, Adm'n, 1214, it is said that advancements are gifts *in presenti*. "The gift, in order to constitute an advancement, must be irrevocable, divesting entirely all of the ancestor's interest, and forming no part of the property to be administered." In *Grey's Heirs v. Grey's Administrators*, 22 Ala. 236, advancement is said "to be a provision made by the parent for his child, of money or property, the entire interest in which passes out of the former in his lifetime; though it is not requisite, in all cases, that it should take effect in possession before the death of the parent." "Whether a gift or conveyance is to be regarded as an advancement or not, is, of course, determined by the intention of the donor at the time the gift is made." 2 Woerner, Adm'n, 1217. By executing these notes the deceased made himself and his estate liable thereon as surety, and there can be no doubt, under the evidence, but that it was his intention that whatever he or his estate might have to pay on account of that liability should stand as an advancement to his son Gus, and it is equally clear that Gus agreed that he should be so charged. The situation is not different from what it would have been had the father given his son these amounts of money under an agreement that whatever thereof the son failed to pay should be charged as an advancement against his share in the estate. *In re Blockley v. Blockley*, 29 Ch. Div. 250, a gift by a father to a son to enable the son to pay a debt was held, on the death of the father intestate, to be an advancement under the statute of distributions. The fact was that, the son being in debt, his father gave him a check, to enable him to pay the debt. The court says: "I think that the sum of money given by a father to his son to pay his debts is or may be an

advancement as much as a sum of money given him for other purposes." Quoting from *Boyd v. Boyd*, L. R. 4 Eq. 305, Wood, V. C., it is said: "Wherever a sum is paid for a particular purpose, which is thought good and right by the father, and which the son himself desires, if it be money which is drawn out in considerable amount, and not a small sum, it must be treated as an advance. The payment of the money is the important thing. The court does not look to the application. As to the debts, suppose the young man had represented to his father that it was extremely important they should be paid, in order that he might keep his position in the army, and the father had paid those sums in order to assist him, it would have been clearly an advance." *Johnson v. Hoyle*, 3 Head, 57, was an action by the creditor of an heir to subject his share in the estate to the payment of the debt, to which defense was made on account of advancements. The proof shows that: "The intestate, then being indorser for his son, Daniel H., in the Branch Bank of Tennessee, at Athens, on a note previously discounted, which, with interest, then amounted to eight hundred and eighteen dollars and thirty-two cents, took up said note, and gave his note and indorsers for the same; and after several renewals and payments in his lifetime the same was paid off by his administrator in February, 1858, out of the assets of the estate. It is stated in the answer that this was regarded by John Hoyle as an advancement to his son, and it is insisted that it shall be so considered. But on this point there is no proof. Yet it is certain that he paid that amount to or for his said son, and took from him no obligation of any kind for it. Nor does it appear that he ever claimed or demanded it from him as a debt. Then, whether it shall be considered an advancement or a debt is left to the legal presumption of such a case. We held at Nashville, last term, in the case of *Vaden*

v. Hance, 1 Head, 300, that where a father advances money to a son, or pays debts for him, the law presumes it is an advancement, unless it is shown by proof or circumstances that it was intended to be held as a debt against the son. Such we consider to be the law, and consequently must regard this as an advancement." See, also, *Steele v. Frierson*, 85 Tenn. 431 (3 S. W. Rep. 649); *Graves v. Spedden*, 46 Md. 527. It will be observed that those cases rest upon the presumption of law that the payments were to be advancements, while in this case there was an express agreement between the father and son to that effect. We think, in the light of these definitions and decisions, that the amounts paid by the father during his lifetime were clearly advancements. A gift, although it must be made in the donor's lifetime, may take effect at the donor's death, or on a contingency within a time, or on a contingency which has happened, and still constitute an advancement, 2 Woerner, Adm'n, 1218; *Hook v. Hook*, 13 B. Mon. (Ky.) 526. Appellant's counsel say, in argument, that deceased never returned the note that he paid to Gus, and never notified Gus what he finally intended to do. When the parent takes a note or other security for repayment, it is *prima facie* a debt, and not an advancement; "but if he takes the notes merely as a memoranda of accounts, and not as evidence of debts, his intention must prevail, and the amounts be charged as advancements." 2 Woerner, Adm'n, 1219. We think it cannot be said, under the evidence, that Englebert Pickenbrock assumed this liability for Gus, or that he paid the amount that he did as a gratuity, not to be accounted for, nor that, in view of the agreement, the relation of debtor and creditor existed. We fail to discern why any different rule should be applied to the payments made by the administrator, from those made by the deceased. They were all made in pursuance of

the agreement and of the expressed intention of Mr. Pickenbrock, Sr., that the amounts thereof should constitute an advancement to Gus. As the amount advanced is in excess of the portion coming to Gus, we need not consider the other question discussed in the case. The judgment of the district court is **AFFIRMED**.

ISAAC A. DOWNEY V. W. H. RIGGS, Appellant.

Forfeiture: LAND SALE. A purchaser of land, who has paid part of the price, and fails to carry out his contract, through no fault of the seller, cannot recover the money paid, though the contract does not provide for a forfeiture.

Appeal from Jefferson District Court.—HON. T. M. FEE, Judge.

TUESDAY, MAY 11, 1897.

ACTION at law to recover back money paid on a contract for the purchase of real estate. The trial court sustained a demurrer to defendant's answer, and a motion to strike his amended answer from the files. Defendant appeals.—*Reversed*.

Leggett & McKemey for appellant.

Wilson & Hinkle for appellee.

DEEMER, J.—According to the allegations of the petition, defendant on the fourteenth day of November, 1891, sold to the plaintiff certain real estate for the agreed price of three thousand dollars, and on the same day executed a bond to convey, which recited that plaintiff had paid one hundred dollars down, and had executed his promissory note for the sum of two thousand nine hundred dollars, payable on the third day of January, 1892. This bond

102	88
103	572
102	88
4122	160
102	88
127	625
102	88
1130	145
102	88
4183	382

contains this concluding sentence: "Now, if the said Isaac Downey shall well and truly pay the full amount of said note, without any interest, then the said W. H. Riggs agrees to convey unto the said Isaac Downey, his heirs or assigns, by a good and sufficient deed, the above described premises; but, should said note not be paid by the time it becomes due and payable, then this obligation is to be null and void; otherwise in full force and virtue in law." At the time the note matured, plaintiff was sick and unable to pay the note; and defendant agreed to extend the time of the payment of the note until such reasonable time as plaintiff could go to Fairfield, make out the papers, and pay the money. On the ——— day of February, 1892, plaintiff notified defendant that he was ready to pay said note and receive his deed. Defendant at that time refused to stand by the contract and complete the sale, and informed plaintiff that he would not let him have the land; that he could have his note, but not the money,—and has ever since refused to receive his money and deliver the deed. Afterwards defendant, without any request from plaintiff, returned his note, through the mail, but refused, and still refuses, to return the one hundred dollars. Defendant answered, admitting the execution of the bond, the payment of the one hundred dollars, and the delivery of the note; that plaintiff was sick at the time the note matured, and that he agreed to give him further time, but avers that this extension was only until a particular Saturday, and that plaintiff failed to make the payment on this particular day, or at any other since that time; that on the twenty-fifth day of January, 1892, plaintiff informed the defendant that he was unable to carry out his contract, and asked defendant to give him back his note and repay the one hundred dollars; that soon thereafter he

returned the note, through the mail, but that he refused to return the money, for the reason that he believes plaintiff has abandoned his contract. He further averred that plaintiff has never tendered the balance of the purchase price, and says that plaintiff has at no time been ready or able to pay the same. All other allegations of the petition are denied. The demurrer was to this answer, and the principal ground of it was, that the answer showed on its face, that defendant had no right to retain the one hundred dollars, for the reason that there was no provision in the contract for a forfeiture of the money paid, in the event either party failed to comply therewith. After the ruling on the demurrer, defendant amended his answer, denying that there was any agreement for rescission, and further pleading that when plaintiff informed the defendant that he was unable to carry out the contract, and asked of the defendant the return of the note and of the money paid, he (defendant) refused to rescind on the terms proposed; that defendant then proposed a rescission of the contract and a return of the note, upon condition that he (defendant) retain the money paid; that plaintiff at that time declined to accept the proposition, and no agreement was reached, but that afterwards, believing that plaintiff would accept the proposition, he (defendant) returned the note by mail, and kept the money; and that plaintiff accepted, and still retains the note. Defendant therefore says that plaintiff is estopped from denying that he accepted the proposition, and is barred of his claim to the money. The motion was to strike this amendment for the reason that it presented no new issue.

The question raised by this appeal is whether a purchaser who has paid a part of the purchase price, and fails or refuses to carry out his contract, can recover what he has paid, when the contract itself

does not provide for a forfeiture. It will be noticed that the answer denies the statement in the petition that defendant refused to carry out his contract, and specifically denies that defendant rescinded the contract. It states, in express terms, that defendant at no time consented to a rescission, except upon condition that he should retain the one hundred dollars. We have no occasion, therefore, to determine what the rights of the parties would be, had there been a rescission by the defendant because of plaintiff's failure to perform. On what theory is plaintiff entitled to recover? Where is the promise, either express or implied, to return the money paid? Plaintiff is at fault in not performing his contract. Can he, by taking advantage of his own wrong, recover back the payment he has made? These questions have been fully answered by the authorities. Mr. Sutherland, in his work on Damages (volume 2, section 585), says: "If a vendee who has partly performed makes default, in consequence of which the sale fails of consummation, he is seldom entitled to relief or compensation for his part performance. He cannot recover a deposit, or the money paid. If the vendor has in his hands a sum paid him on the contract of purchase largely in excess of the damages sustained by him in consequence of the loss of the bargain, he may retain it, because while the contract subsists the party in default cannot recover it or any equivalent of it in damages, the vendor not being in default." Prof. Keener, in his learned treatise on Quasi Contracts, at page 23, says: "Either party being at liberty to perform the contract, and it not being the policy of the statute to discourage the performance of such contracts, it is generally held that there can be no recovery against a defendant not in default, for benefits received. Thus, it is held that money paid in performance in whole or in part of an oral contract

for the purchase of land, cannot be recovered if the vendor is willing to convey the property on the performance of the conditions by the plaintiff." This statement is made in connection with the subject of the statute of frauds, but the principle is none the less applicable to the case at bar. 2 Warvelle, Vend., p. 949, section 8, has this as a statement of the law: "Usually the law will not permit a party to maintain an action on his own breach of his own contract; and where a vendee, who has paid money upon a contract of purchase, refuses to proceed, he cannot, save under very exceptional circumstances, sustain an action to recover back the amount of the payments so made." These statements from the text writers are fully sustained by the authorities. See *Ketchum v. Evertson*, 13 Johns. 359; *Havens v. Patterson*, 43 N. Y. 218; *Page v. McDonnell*, 55 N. Y. 299; *Lawrence v. Miller*, 86 N. Y. 131; *McManus v. Blackmarr* (Minn.) 50 N. W. Rep. 230; *Davis v. Hall*, 52 Md. 673; *Green v. Green*, 9 Cow. 46; *Roach v. Waid*, 2 T. B. Mon. 142; *Frost v. Frost*, 11 Me. 235. In the case of *Nason v. Woodward*, 16 Iowa, 216, we approved an instruction to the effect that if there was an entire rescission of a contract between vendor and vendee by mutual assent, and no further agreement or understanding, the vendor would be liable for failure to return payments made, but that if the only agreement or understanding was that the vendor should surrender the notes given him by the vendee, and the vendee was to give up his bond for a conveyance, the law would, on this state of facts, impose no obligation to return to the vendee what he had previously paid. We may well assume, without deciding, that if the contract between these parties had been rescinded by mutual assent, or if the defendant had rescinded because of the failure of the plaintiff to perform, plaintiff might recover. See 2 Sutherland, Dam., p. 232; *Burge v. Railroad Co.*, 32 Iowa, 105;

Anderson v. Haskell, 45 Iowa, 45. But the defendant in his amended answer specially denied that the contract was rescinded, and pleaded facts which, if proven, would justify a jury in finding that plaintiff had agreed that defendant should retain the money paid, or that he was estopped from denying that such an agreement had been made. The instances in which a vendee who is in default may recover payments made have thus been stated by Welles, J., in *Battle v. Bank*, 5 Barb. 414: "The cases in which a vendee is allowed to recover back money paid on a contract for the purchase of real estate, where the contract has been rescinded, are: *First*, where the rescission is voluntary, and by the mutual assent of both parties, and without default or wrong of either; *second*, where the vendor is incapable or unwilling to perform the contract on his part; or, *third*, where the vendor has been guilty of fraud in making the contract. In either of these cases it would be against equity and conscience for the vendor to retain the money, and the law implies a promise on his part to refund it. But in a case where the vendor has in all respects performed his part, and the rescission is entirely in consequence of the unexcused default of the vendee in making further payment, to allow him to recover back the money paid would, in my opinion, be little short of offering a bounty for the violation of contracts." Again, McAllister, J., in the case of *Boston v. Clifford*, 68 Ill. 67, speaking for the court, said: "The cases wherein the vendee may maintain an action to recover back money paid by him under a contract for the purchase of real estate, where the contract has been rescinded, are: *First*, where the rescission is voluntary, and with mutual consent of the parties, and without default of either side; *second*, where the vendor cannot or will not perform the contract on his part; *third*, where the vendor has been

guilty of fraud in making the contract; *fourth*, where, by the terms of the contract, it is left in the purchasers' power to rescind it by any act on his part, and he does it; *fifth*, where neither party is ready to complete the contract at the stipulated time, but each is in default." The answer filed in this case, with its amendment, negatives any state of facts which would give plaintiff the right to recover under any of these rules, and the court was in error in sustaining the motion to strike.—REVERSED.

102 94
110 108

J. K. P. THOMPSON, Appellant, v. THE INDEPENDENT
SCHOOL DISTRICT OF ALLISON IN THE COUNTY
OF LYON, *et al.*

Municipal Debt: CONSTITUTIONAL LAW: Presumptions. A judg-

1 ment against a school district, on orders issued in payment of other valid orders, though rendered at a time when the outstanding obligations of the district are in excess of the constitutional limit, does not create an indebtedness, within the inhibition of the constitution. It will be presumed, in the absence of evidence to the contrary, that the debt was within the maximum limit when the orders were issued.

FRAUD AND COLLUSION: Default judgment. The fact that a judg-

1 ment by default was rendered against a school district at a time when its outstanding obligations were largely in excess of the constitutional limit, does not show that it was obtained by fraud and collusion.

EXCESSIVE INTEREST: Bonds. The fact that bonds issued by a

3 school district in payment of a valid judgment against it, drew semi-annual interest, at ten per cent. per annum, and that the aggregate amount thus agreed to be paid, in excess of the judgment, creates an indebtedness beyond the constitutional limit, will not prevent recovery of the amount of the bonds, with semi-annual interest at six per cent. per annum.

Taking Effect of Statutes. Acts Seventeenth General Assembly, chap-

2 ter 132, authorizing any school districts against which judgments have been rendered "prior to the passage of this act," to issue bonds in payment thereof, includes judgments rendered between the approval of the act and the time it took effect.

Appeal from Lyon District Court.—HON. G. W. WAKEFIELD, Judge.

TUESDAY, MAY 11, 1897.

ACTION at law to recover an amount alleged to be due on a certain judgment, or on bonds issued for its payment. There was a trial by the court, and a judgment in favor of the defendants for costs. The plaintiff appeals.—*Reversed.*

Parsons & Riniker for appellant.

McMillan & Dunlap for appellees.

ROBINSON, J.—On the fourteenth day of May, A. D. 1878, the district court of Lyon county rendered judgment in favor of the plaintiff and against the independent district of Riverside for the sum of eight hundred and sixty-eight dollars and eighty cents, with interest thereon, and for costs. On the sixteenth day of July in the same year, the district issued to the plaintiff, for the purpose of satisfying the judgment, its four negotiable bonds for the aggregate sum of eight hundred dollars, and judgment orders for the remainder due on the judgment. The plaintiff sold the bonds to a capitalist of Minnesota, and ten or twelve years after, re-acquired them by purchase. The independent district of Riverside was organized in September, 1872, and continued to exist until the year 1885, when the defendants, the independent district of Allison and the independent district of Jackson, were organized from its territory, and became responsible for its liabilities. The judgment has never been paid, excepting by the issuing of the bonds and orders specified. The plaintiff claims to own the judgment and bonds, and coupons attached, and

demands judgment thereon for the sum of two thousand, seven hundred and twenty-six dollars and twenty-five cents, with interest and costs. The defendants allege that the judgment was obtained through fraud and collusion between the plaintiff and the independent district of Riverside and its officers, by reason of which the judgment is not a just and valid claim against the defendants; that when the bonds were issued the independent district of Riverside did not have authority to issue them; and that the judgment was rendered and the bonds were issued in violation of section 3 of article 11 of the constitution of this state, which forbids any county or other political or municipal corporation to become indebted to an amount exceeding five per cent. of the value of the taxable property within such corporation.

I. The evidence is not sufficient to show that the judgment was obtained through fraud and collusion. It was rendered by default, at a time when the outstanding obligations of the district were largely in excess of the constitutional limit, but it was rendered on orders all of which were issued in lieu or in payment of other orders. What the indebtedness of the district was when the original orders were issued is not shown; and we must presume it did not exceed the authorized limit, and that the orders were valid. If that was the case, the orders issued in lieu of them did not create an indebtedness, within the meaning of the constitutional inhibition, and none was created by the rendition of the judgment. *Edmundson v. School District*, 98 Iowa, 639 (67 N. W. Rep. 671). There is no other evidence of fraud or collusion in obtaining the judgment, and that was insufficient to show that the judgment was wrongfully obtained. *Independent District v. Miller*, 92 Iowa, 677 (61 N. W. Rep. 376).

II. The defendants do not seriously contend that the judgment was illegal, but insist that it was fully satisfied by the issuing of the bonds and orders in payment of it, and that the bonds are void because not issued by authority of law. The resolution of the board of directors under which the bonds were issued to the plaintiff shows clearly that they were so issued "for the purpose of satisfying said judgment," and the court was fully authorized to find that they were received in payment of it. The claim that they were not authorized by law is based upon the fact that chapter 132 of the Acts of the Seventeenth General Assembly, under which they were issued, was passed by the general assembly and approved by the governor before the judgment in question was rendered, and that the act only authorized "any school district against which judgments have been rendered prior to the passage of this act" to issue such bonds. The act was approved March 25, 1878, while the judgment, as we have stated, was not rendered until the four-

2 teenth day of the next May. Therefore, the question to be determined on this branch of the case is, to what time do the words "prior to the passage of this act," contained in the statute, refer? The question is not an open one. Section 1249 of the Code of 1851 provided that the homestead of the head of a family might be sold on execution for debts contracted "prior to the passage of this law." That was approved February 5, 1851, but did not take effect until the first day of the next July. In *Charless v. Lamberson*, 1 Iowa, 442, it was held that the words "prior to the passage" related to the time the act took effect, and not to the time of its passage. In *Rogers v. Vass*, 6 Iowa, 408, it was said that the clause "at the time of the passage of this act," and similar expressions in statutes, have legal reference to the time of their taking effect. See, also, *Bennett v*

Bevard, 6 Iowa, 82; *City of Davenport v. Davenport & St. P. R'y Co.*, 37 Iowa, 624; *Sutherland*, St. Const., sections 107, 160. The general assembly did not provide the the statute in question should take effect by publication, and it did not take effect until the fourth day of July, 1878. Constitution, Iowa, art. 3, section 26; Code, section 34. As the judgment in controversy was rendered before that time, authority to issue bonds in payment of it was given by the statute.

III. The judgment drew interest at the rate of six per cent. per annum. The bonds were payable ten years after their date, and provided for the payment of interest at the rate of ten per cent. per annum, payable semi-annually, on the presentation and surrender of coupons thereto attached. It thus appears that the bonds provided for the payment of thirty-two dollars each year, in semi-annual payments, or for an aggregate of three hundred and twenty dollars by the time the bonds matured, in addition to the amount
3 required by the judgment. The excess thus provided for amounts at this time to more than six hundred dollars. It is clear that, to the extent of such excess, the bonds purported to create a liability in addition to that represented by the judgment; but whether it was an indebtedness, within the meaning of the prohibition of the constitution, or whether it may have been regarded as pertaining to the ordinary expenses of the district, and within its current revenues, under the rule stated in *Grant v. City of Davenport*, 36 Iowa, 396, and considered in *Dively v. City of Cedar Falls*, 27 Iowa, 233; *City of Council Bluffs v. Stewart*, 51 Iowa, 392 (1 N. W. Rep. 628); *Anderson v. Insurance Co.*, 88 Iowa, 594 (55 N. W. Rep. 348); and *Tuttle v. Polk*, 92 Iowa, 436 (60 N. W. Rep. 733),—is a matter which has not received any attention in this case, and which we do not determine. If it be true that it was an unauthorized indebtedness

that would not prevent a recovery for the amount of the bonds, and semi-annual interest thereon at the rate of six per cent. per annum. The legal is readily distinguished from the illegal part of the contract, and judgment may be given on the part which is legal. Clark, Cont., 471. See, also, *McPherson v. Foster*, 43 Iowa, 72. It follows from what we have said that the district court erred in denying the plaintiff relief on the evidence submitted, and its judgment is therefore REVERSED.

ELIZA CASON V. THE CITY OF OTTUMWA, Appellant.

Negligence: HIGHWAYS: Municipal corporations. A city is charge-
5 able with knowledge of the existence of the use of an unfastened billboard weighing one hundred and forty pounds, at the entrance of an opera-house near the sidewalk, and of the danger of its being blown over by a wind, where it has been so used for four or five months.

NOTICE. Evidence as to the places where a billboard, by the blow-
8 ing over of which plaintiff was injured, had been kept at different times, is admissible in an action against the city, to show how such board was used and that it had been used for such time before the accident that the city was chargeable with notice of its use.

VERDICT: Evidence. A verdict that a city was negligent in allowing
8 a billboard to stand on the sidewalk is sustained by evidence that it was 4x8 feet in size, and weighed one hundred and forty pounds; that, when not in actual use in front of the building, it was so placed that the top rested against the side wall, while the bottom rested a few inches from it on the sidewalk; that it was not fastened in any way; and that it had been so used and kept for such a length of time that the city was chargeable with knowledge of it.

Contributory Negligence: Highways. One is not as a matter of law,
9 guilty of contributory negligence in passing an unfastened billboard, weighing one hundred and forty pounds, without thinking of and guarding against the danger from it, on a day on which a strong wind is blowing; it not being clearly shown that there was anything unusual in the strength of the wind which blew the billboard over upon plaintiff.

102	99
118	804

102	99
115	642

102	99
117	619

102	99
129	79
129	452

102	99
131	572

102	99
140	671

Evidence: CONCLUSIONS. A question requiring a witness to state
6 whether a billboard, by the blowing over of which plaintiff was injured, was, in any sense, in the way of people walking along the sidewalk, is properly excluded as calling for the opinion of the witness

Jurors: MUNICIPAL CORPORATIONS. A tax payer of a city has such
4 an interest in the result of an action brought against the city for personal injuries as disqualifies him to act as a juror.

Amendment in Trial: PLEADING: Practice. A trial amendment to
3 the petition in an action for personal injuries, which does not change the claim originally made, except to allege some effects of
2 the accident, which had not been originally stated, and to show that some were more serious than they were at first claimed to be, will not be stricken out on motion made two days after the amendment is filed, and after evidence in support of the amendment has been introduced.

Appeal: STRIKING AMENDMENT TO ABSTRACT. An amendment to the abstract, setting out matter to cure formal defects in the
1 original abstract, will not be stricken out on the ground that it was filed without leave, and after the cause had been fully argued by the appellee, where the submission of the cause on the merits was not delayed thereby.

ARGUMENTS: Objections. In civil cases, objections not discussed in
7 argument, will not be considered.

Appeal from Wapello District Court.—HON. W. I. BABB, Judge.

WEDNESDAY, MAY 12, 1897.

ACTION at law against the city of Ottumwa and the Ottumwa Opera-House Company to recover for personal injuries alleged to have been caused by their negligence. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant the city of Ottumwa, appeals.—*Affirmed.*

W. W. Epps for appellant.

J. J. Smith and *W. H. C. Jaques* for appellee.

ROBINSON, J.—In the year 1892, the defendant, the Ottumwa Opera-House Company, owned and controlled an opera-house in the city of Ottumwa. The front of the house was on Main street, and one side was next to Jefferson street. For the purpose of advertising entertainments which were given in the house from time to time, billboards were provided, one of which was 4x8 feet in size. When in use, that was usually placed at the main street entrance, but at other times was kept on the Jefferson street side, where it was so placed that the top rested against the building, while the bottom rested a few inches from it on the sidewalk. The board was not fastened in any manner. In the morning of the thirty-first day of March of the year mentioned, and when the billboard was in the position last described, the plaintiff was passing northward on Jefferson street; and, when on the walk near the billboard, it was blown upon her by the wind with such force as to prostrate and render her insensible, and inflict serious injuries upon her. She alleges that the opera-house company was negligent in placing the billboard where it was, and that the city was negligent in permitting it to be placed and kept there, and that her injuries were due to the negligence stated. The city denies that it was negligent, and pleads contributory negligence on the part of the plaintiff.

I. The appellee has filed a motion to strike from the files an amendment to the abstract, on the ground that it was filed without leave, and after the cause had been fully argued by the appellee. The amendment sets out matter to cure formal defects in the original abstract, and did not delay the submission of the cause on its merits. The motion will therefore be overruled.

II. The appellant complains of the refusal of the court to strike certain portions of an amendment to the petition, and urges that the amendment was not filed until the second day of the trial, and that the portions objected to were a departure from the claim made in the original petition, which surprised the appellant, and which it was not able to meet. The abstract does not show when the trial was commenced, but it appears that the amendment had been on file two days when the motion to strike was filed, and two days before the evidence for the plaintiff was closed. Hence it seems the appellant did not attack the amendment until after the evidence to support it had been submitted. The amendment did not change the claim originally made by the plaintiff, excepting to allege some effects of the accident which had not been originally stated, and to show that some were more serious than they were first claimed to be. The district court rightly overruled the motion to strike, because the amendment was in all respects proper, and also because of the appellant's delay in filing his motion to strike.

III. The court sustained challenges to certain jurors, on the ground that they were residents and taxpayers of the city of Ottumwa. The appellant insists that the court erred in so doing, for the reason that the jurors showed that they had no prejudice or bias which would affect their verdict, and that the fact that they were taxpayers of the defendant city would not influence them. But, as taxpayers, they had an interest in the result of the litigation, which disqualified them to act as jurors, and the challenges were properly sustained. *Kendall v. City of Albia*, 73 Iowa, 243 (34 N. W. Rep. 833); *McGinty v. City of Keokuk*, 66 Iowa, 725 (24 N. W. Rep. 506).

IV. A witness was asked with respect to the places where the billboard was kept at different times, and how long she had seen it used in the manner described. The question was proper, as tending to show how the billboard was used, and that it had been used in the manner stated for such a length of time before the accident that the city must be presumed to have had knowledge of its use before that time. Another witness was asked the following: "The board was in no sense in the way of people walking along the sidewalk?" An objection to the question was properly sustained. It called for an opinion of the witness concerning a question of fact, which, so far as material, the jury was required to decide from the evidence submitted.

V. The appellant claims that the court erred in refusing to give twelve instructions, which were asked. Nothing in the nature of an argument is made in support of the claim, excepting as to the instruction numbered 2, and the substance of that was incorporated in the charge given. It is not our practice to consider in civil cases objections not discussed in argument, and the instructions refused will not be further noticed.

VI. The remaining question, and the one of chief importance, is, did the evidence authorize a verdict against the city? After the plaintiff had introduced her evidence in chief, the city asked the court to direct a verdict in its favor, for the alleged reason that there was not sufficient evidence to warrant a verdict against it, and, after the verdict was rendered, asked for a new trial, on the same ground. The jury found specially, that the billboard weighed one hundred and forty pounds; that it was hurled against the plaintiff by a wind of not more than ordinary force; that the placing of the board at the side of the opera-house was

negligence; that for four or five months it had been usually kept at the entrance of the opera-house on Main street, or at the Jefferson street side; that officers of the city, who were charged with the supervision of the sidewalks and streets of the city, knew of the location and condition of the board on the day of the accident; that the city was negligent in permitting the board to be placed where it was at the time of the accident; and that the plaintiff was not negligent. It was not shown that any officer of the city charged with the duty of keeping the sidewalks in a safe condition had any actual knowledge of the condition and use of the billboard before the accident occurred. A policeman, whose beat was near the opera-house, knew of the board, but it does not appear that he had any duty to perform respecting it. However, it was the duty of the city to keep its sidewalks in a reasonably safe condition. In *Bliven v. City of Sioux City*, 85 Iowa, 351 (52 N. W. Rep. 246), it was said that this duty extends not merely to the surface of the walk, but "to those things within its control which endanger the safety of those using the walk properly." That case involved an injury caused by the fall of a billboard which stood near a sidewalk, and this court said, in effect, that it was the duty of the city to have prevented its fall. The evidence shows that the billboard in question was used and kept in a negligent manner, which might have been observed by all who were near it, and that it had been so used and kept for such a length of time that the city was chargeable with knowledge of it. *Hazard v. City of Council Bluffs*, 87 Iowa, 52 (53 N. W. Rep. 1083); *Ronn v. City of Des Moines*, 78 Iowa, 64 (42 N. W. Rep. 582); *Cramer v. City of Burlington*, 39 Iowa, 513; *Dou-lon v. City of Clinton*, 33 Iowa, 397.

Although the plaintiff could have seen the board, yet she was not necessarily negligent in passing it

without thinking of and guarding against the danger from it. Much testimony was given to show
 9 that a strong wind was blowing at the time of the accident, and that the board was blown against the plaintiff by a violent and unusual gust of wind. It seems clear that later in the same day, and during the next one, there was much wind which blew with unusual force, and that some damage to buildings and trees was done by it. It is not so clear, however, that there was anything unusual in the wind which caused the accident, and the jury was authorized to find that there was not. The evidence does not show, beyond question, negligence on the part of the city, but is sufficient to sustain the verdict of the jury. We do not find any ground for disturbing the judgment of the district court, and it is **AFFIRMED**.

MICHAEL STEYER, Appellant, v. **PATRICK McCAULEY, JR.**,
BERTHA ROSENTHAL, **EMIL ROSENTHAL**, and
 the Buildings, Etc.

102	106
110	218
102	106
125	617

Liquor Injunction: SECOND INJUNCTION: Abatement. An injunction enjoining a liquor nuisance and proceedings pending thereunder for contempt, though no writ of abatement issues, though the attorneys in the main suit and the contempt proceedings are not the same, and though there is unexplained delay in bringing the contempt case to hearing, are a bar to an action against the defendant by another citizen to obtain a second injunction for a similar offense on the same premises; no fraud or collusion being charged in the obtaining of the first injunction.

Appeal from Winneshiek District Court.—HON. A. N. HOBSON, Judge.

WEDNESDAY, MAY 12, 1897.

THIS is an action in equity begun August 10, 1896, to restrain the defendants from maintaining an alleged liquor nuisance on a certain lot in the town of

West Decorah, Iowa. The prayer asks that the nuisance be abated; that defendant Emil Rosenthal be enjoined from using or permitting said premises to be used for the keeping of intoxicating liquors with intent to be sold in violation of law; also, that each defendant be enjoined from selling or keeping for sale intoxicating liquors on said premises or elsewhere in said judicial district. An order was made for a hearing upon the application for a temporary injunction. Evidence was taken in support of the application, and in resistance thereof. Upon said hearing it appeared that the mulct law was operative in the town of West Decorah; that defendant Emil Rosenthal claimed to have complied with said law in all respects; that at a prior term of court said Emil Rosenthal had been enjoined from keeping, using and occupying the same premises, by himself or agents, for the sale of intoxicating liquors; that said injunction was granted upon the petition of one Cameron, that in January, 1895, said Cameron commenced proceedings against defendant Emil Rosenthal for contempt for a violation of said injunction; and that said contempt proceeding is still pending. The court refused the application for a temporary injunction, and, the cause thereafter coming on for a hearing upon the merits, the defendants denied all of the allegations of the petition, and pleaded the former action, and the injunction and proceedings thereunder, as still pending. Evidence was introduced, and it was agreed that, in the action in which the injunction was granted, J. B. Kaye was the attorney for the plaintiff, Cameron; that no writ of abatement issued in that suit. Plaintiff amended his petition, admitting the issuance of the injunction, and says that the plaintiff in that action and in this is not the same; that the attorneys are different, and that no writ of abatement issued in the former suit; that McCauley and Bertha Rosenthal were not parties to

the former suit. A decree was entered dismissing plaintiff's petition, and rendering a judgment against him for costs. Plaintiff appeals.—*Affirmed.*

E. R. Acres for appellant.

Geo. W. Adams for appellees.

KINNE, C. J.—This case presents the question whether, after an injunction has been issued restraining one from continuing a liquor nuisance, and after proceedings thereunder have been commenced against him for contempt for violating said injunction, which proceedings are still pending and undisposed of, another citizen of the county may maintain another suit against the same and other persons as defendants for a like offense committed in and upon the same premises, and obtain another injunction. It was held in *Dickinson v. Eichorn*, 78 Iowa, 710 (43 N. W. Rep. 620), that a decree for an injunction and the abatement of such a nuisance obtained by one citizen of a county, although not enforced, was a bar to a second suit for the same purpose by another citizen for the abatement of the same nuisance, in the absence of a showing that the former decree was obtained by collusion, with the intent to use it to defeat the purposes of the law. So far at least as the defendant Emil Rosenthal is concerned, that case seems to us decisive of this appeal.

It appears that in November, 1891, at the suit of one Cameron, Emil Rosenthal was perpetually enjoined from maintaining the same kind of a nuisance at the same place; that in January, 1895, said Cameron instituted proceedings against Emil Rosenthal for a violation of said injunction, which proceedings are still pending and undetermined. There is nothing in this record to show why this contempt case has not been

heard. There is no suggestion in the record of any bad faith or collusion in obtaining the original injunction. For some reason, which does not clearly appear, no order of abatement was entered in that suit. The facts in this case, so far as the defendant Emil Rosenthal is concerned, are identical with those in the cited case, except in that case the same person was attorney for the plaintiff in both actions, and the decree in that case ordered an abatement of the nuisance. In that case no proceedings had been instituted against the defendants for contempt. We do not regard the fact that the attorney appearing in this case is not the same person who appeared in the original case as of controlling importance, especially in the absence of anything showing any reason why the contempt proceedings has not been heard, and there being no charge or evidence of bad faith on the part of the party or attorney instituting the original and contempt proceedings. Only about six months had intervened between the time the proceedings for contempt were begun and the bringing of this action, and we can not say, in the absence of other evidence, that there was not good cause for this delay, or that said proceedings were not being prosecuted in good faith. The case of *Carter v. Steyer*, 93 Iowa, 533 (61 N. W. Rep. 956), wherein the right to a second injunction is upheld, is, in its controlling facts, essentially different from the case at bar.

As to the defendant Bertha Rosenthal, there is no evidence showing that she was in any way concerned in running or operating the saloon, and no reason appears why she should have been made a party defendant. As to McCauley, he appears to have been a bartender for the defendant Emil Rosenthal, and as such was his agent, and is clearly embraced within the decree rendered in the original case in which an injunction was rendered. *Silvers v. Traverse*, 82 Iowa,

55 (47 N. W. Rep. 888); *Buhlman v. Humphrey*, 86 Iowa, 597 (53 N. W. Rep. 318).

We think the reasoning of the *Dickinson Case* is conclusive as to the questions here presented, and we need not further consider them. The decree of the district court is **AFFIRMED**.

W. F. JOHNSTON, Appellant, v. LYMAN COLE.

102	109
105	552

Bonds: SURETIES: Delivery. Where a surety signs a bond, with an agreement that it should not be delivered until another, whose signature is not obtained, should sign as co-surety, and never authorizes a delivery, there is no liability.

KINNE, C. J., took no part in this case.

Appeal from Grundy District Court.—HON. FRED O'DONNELL, Judge.

WEDNESDAY, MAY 12, 1897.

PLAINTIFF made a contract with J. T. Elliott, to construct for him a house and barn, for the agreed price of ten thousand dollars, in accord with certain plans and specifications, and to complete the same by January 1, 1882. The contract provided that, should there be a failure to complete the buildings in accordance with its terms, the same might be completed by the plaintiff, and that Elliott should be answerable in damages, including a penalty of five dollars per day for the time after the day fixed for the completion of the buildings. As security for the performance of his contract, Elliott was to execute a satisfactory bond to plaintiff for the faithful performance of his contract, and the defendant appears as a surety on a bond executed in pursuance of such contract. The petition shows a breach of the contract in several particulars, and especially that the buildings were not completed

in the time required, nor, in fact, at all, by Elliott, and that plaintiff completed the same, and made payments so that his aggregate damage is four thousand, one hundred and eighty-nine dollars and fifty-four cents, for which he asks judgment against defendant, as surety on the bond, with interest thereon. The answer consists of denials, and a defense that may be more particularly noticed in the opinion. The cause was tried to a jury that found for defendant, and from a judgment thereon the plaintiff appealed.—*Affirmed.*

J. W. Willett for appellant.

Boies & Boies for appellee.

GRANGER, J.—Elliott, who was principal in the bond, is not a party to the suit. There is no liability in the case unless the bond is valid as to the defendant. Defendant admits that he signed his name to the bond as surety, but that it was never delivered with his knowledge or consent. He says, in his answer, that the bond was presented to him for his signature, and that it was agreed that the bond was not to be delivered to plaintiff unless one Morrison should become a co-surety thereon with defendant; and he further says that Morrison's signature was not obtained thereto. Defendant introduced evidence directly in support of such plea, and the court instructed the jury to the effect that, if the plea was sustained by the proofs, there could be no recovery. It affirmatively appears that Morrison's name is not to the bond. The jury answered in the negative the following interrogatory submitted by the court: "Did Lyman Cole deliver the bond sued on to the plaintiff, or authorize the delivery thereof, without the signature of Morrison thereto?" This cause was tried in

December, 1893. The division of the answer referred to has been in no way questioned as to sufficiency, and under repeated holdings of this court it must be taken as stating a defense. Such was the uniform holding prior to the Act of the Twenty-fifth General Assembly, which somewhat changed the law in that respect. The legal effect of the special finding is that the bond is of no validity against defendant. Unless its effect is in some way avoided, it seems conclusive of the case, for the bond is the basis of the action, as this defendant is in no way a party to the contract on which default is claimed. It is said that Elliott, who is principal in the bond, delivered it to Johnston. That is true, but it was without authority. The issues present no facts to bring in question the legal effect of such a delivery. The facts pleaded as a defense are proven, as shown by the special verdict. The plea was of defensive matter, as to which the law operated as a denial, so that an issue was presented on which evidence was taken, and the question definitely determined. The general verdict was also for the defendant; so that, with the bond of no validity, there can be no recovery. It is not important to consider other questions. The judgment must be **AFFIRMED**.

KINKE, C. J., took no part in this case.

GEORGE D. HARRISON V. THE HARTFORD FIRE INSURANCE COMPANY, Appellant.

Abatement: FORMER ADJUDICATION. Code, section 2851, provides

- 1 that a finding must distinguish between matters pleaded in abatement and in bar, and that the judgment, if rendered on the matter in abatement, and not on the merits, must so declare. *Held*, that a judgment entry reciting that the court found the suit was prematurely brought, and directed a verdict for defendant, sufficiently shows that a judgment was rendered on a plea in abatement, and hence is no bar to another action for the same cause.

Limitations of Action by Contract. A provision in a policy that no
 3 suit thereon shall be sustainable unless commenced within twelve months after the fire, is valid.

CONTINUATION OF FIRST SUIT: Construction of statute. Code, section 2537, providing that if plaintiff fail in an action for any
 4 cause except negligence in prosecution, and a new suit be brought within six months thereafter, "the second suit shall, for the purposes herein contemplated, be a continuation of the first," does not apply to a stipulation in a policy requiring suit thereon to be brought within a specified time after loss; and the second suit will be barred unless commenced within the time so limited.

Appeal from Louisa District Court.—HON. BEN MCCOY Judge.

WEDNESDAY, MAY 12, 1897.

ACTION at law upon a policy of fire insurance. Defense: Former adjudication, another suit pending, and a contract limitation upon the suit. Trial to a jury; verdict and judgment for plaintiff; and defendant appeals.—*Reversed*.

McVey & Cheshire for appellant.

D. N. Sprague and *A. H. Stutsman* for appellee.

DEEMER, J.—The policy in suit was issued on the eighteenth day of June, 1890, and the fire occurred on the fourth day of October, 1892. On the sixteenth day of January, 1893, plaintiff commenced suit on the policy in the district court of the county of Louisa. The defendant removed this action to the federal court, and on the twenty-seventh day of January, 1894, a trial was had, resulting in a directed verdict for the defendant. Thereafter, and on the twenty-ninth day of May, 1894, plaintiff commenced another action on the policy in the federal court. To the last-named petition, defendant filed a demurrer. This demurrer was sustained on the fifth day of July, 1894. Thereupon plaintiff amended his petition, and on the same day dismissed his action, without prejudice. On the twenty-fifth day of July, 1894, plaintiff commenced this action upon the same policy in the district court of Louisa county, Iowa; and at the trial which was had on the twentieth day of September, 1895, recovered judgment in the sum of one thousand nine hundred and ninety-nine dollars, and this appeal followed.

I. The first point relied upon by appellant is, that the judgment rendered by the federal court on the twenty-seventh day of January, 1894, is *res adjudicata*. That case was tried to a jury, and
1 resulted in a directed verdict for the defendant.

The record of the judgment rendered upon the verdict, is as follows: "This day, this cause coming on to be heard upon the motion of the defendant heretofore filed, come the parties, attorneys, and jury theretofore impaneled; and, the argument of counsel being completed, upon consideration thereof by the court, the court found that the suit was prematurely brought under the statutes of Iowa, and thereupon sustains the said motion, because the action was

commenced on the sixteenth day of January, 1893, contrary to the provisions of the statute of Iowa, section 3, chapter 211, of the Acts of the Eighteenth General Assembly, and thereupon directed the jury to return a verdict for the defendant, which they thereupon did, in words and figures following, to wit: 'We, the jury, by the direction of the court, find for the defendant. [Signed] W. E. Steadman, Foreman.' It is thereupon ordered, considered, and adjudged that the defendant have and recover of the plaintiff the costs of this suit, taxed at \$10.45, and the clerk is directed by consent of parties to tax, as a part of the costs herein, the reporter's fees herein, at \$10, each party to pay one-half thereof." Appellee says, that the judgment and the verdict, when construed with reference to this record, clearly show that the action in the federal court was abated, and not tried upon its merits, and that it is no bar to this proceeding. Our Code provides that, "where matter in abatement is plead, in connection with other matter not such, the finding of the jury or court must distinguish between matter in abatement and matter in bar, and the judgment must, if it is rendered on the matter in abatement, and not on the merits, so declare." Code, section 2851. This section has been given a somewhat liberal interpretation, and we have heretofore held, in effect, that if it fairly and reasonably appears from the record, that there was no trial upon the merits, and that the judgment was upon a plea in abatement, it will not be treated as a bar to another action for the same cause. *Boyer v. Austin*, 54 Iowa, 402 (6 N. W. Rep. 585); *Atkins v. Anderson*, 63 Iowa, 741 (19 N. W. Rep. 323); *Kern v. Wilson*, 82 Iowa, 407 (48 N. W. Rep. 919). It clearly appears from the judgment entry heretofore set out, that the court found that the suit was prematurely brought, and for that reason directed the jury to return a verdict for the defendant. The idea

that the verdict and judgment was upon the merits is distinctly negatived. No citation of authority is needed to show that a judgment upon a plea in abatement is no bar to another action.

II. The defense of another suit pending is not relied upon here, and we give it no attention.

III. The policy in suit contained this among other provisions: "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." Defendant claims that this provision

is a bar to plaintiff's action. It will be noticed
2 that this action was commenced two years, nine months, and twenty-one days after the fire, and

more than two years and six months after the ninety days in which plaintiff must have given notice and proofs of loss. Such a stipulation as that contained

in this policy is valid in every state in the
3 Union save Indiana. See *Carter v. Insurance*

Co., 12 Iowa, 287; *Vore v. Insurance Co.*, 76 Iowa, 548 (41 N. W. Rep. 309); *Moore v. Insurance Co.*, 72 Iowa, 414 (34 N. W. Rep. 183); *Heusinkveld v. Insurance Co.*, 95 Iowa, 504 (64 N. W. Rep. 594); *Riddlebarger v. Insurance Co.*, 7 Wall. 391; *Insurance Co. v. Whitehill*, 25 Ill. 382, and cases cited in 2 Wood, Insurance, section 460. There is no claim that this condition has been waived; hence plaintiff's action is

barred unless there be something in his claim
4 that section 2537 of the Code applies. That

section is found in chapter 2 of title 17 of the Code of 1873, relating to limitation of actions, and is as follows: "If after the commencement of an action the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be brought within six months thereafter, the second suit shall

for the purpose herein contemplated be a continuation of the first." Statutes similar to this exist in many of the states, and the question has frequently arisen whether such a statute is applicable to a contract limitation such as the one in the policy in suit. The general tenor of the authorities is to the effect that it is not, for the reason that the rights of the parties arise out of contract which relieves them from the general limitations of the statute, and as a consequence from its exceptions also. See *Riddlesbarger v. Insurance Co.*, *supra*; *Arthur v. Insurance Co.*, 78 N. Y. 462; *Association v. Norris* (Pa. Sup.) 8 Atl. Rep. 638; *McElroy v. Insurance Co.* (Kan. Sup.) 29 Pac. Rep. 478; *McIntyre v. Insurance Co.* (Mich.) 17 N. W. Rep. 781; *Insurance Co. v. Hocking* (Pa. Sup.) 18 Atl. Rep. 614; *Wilson v. Insurance Co.*, 27 Vt. 99; May, Insurance, section 483.

These further considerations make it clear to our minds that the statutory exception does not apply. The section quoted says in express terms that the second suit shall, for the purposes (therein) contemplated, be deemed a continuation of the first. What are the purposes therein contemplated? Manifestly, the statutory limitation; not the one created by contract of the parties. Again, the statute says that the second suit shall be deemed a continuation of the first. If it is so regarded, and the plaintiff is allowed to recover, we have the strange anomaly of a plaintiff being allowed to recover in an action which was confessedly prematurely brought. Such an effect was not contemplated by the legislature, and such a construction is entirely untenable. We do not think this statute has any application to the contract limitations provided in the policy. Appellee asserts with confidence that we have already committed ourselves to the doctrine that the statute is applicable to contract limitations, and he

cites the cases of *Jacobs v. Insurance Co.*, 86 Iowa, 145 (53 N. W. Rep. 101), and *Archer v. Railroad Co.*, 65 Iowa, 612 (22 N. W. Rep. 894). It is true, we said in the *Jacobs Case* that the condition in the policy and the statute must be construed together; but this statement was made with reference to the peculiar facts of that case. Timely action was brought upon the policy in that case. During the trial, a mistake in the description of the property was discovered, and plaintiff filed a substituted petition, asking reformation. This relief was granted. Thereafter plaintiff commenced a suit in equity, based upon the policy as reformed, and in the petition recited the facts as to the mistake in the policy, the action to reform, and certain other things as an excuse for his delay in commencing his suit. This last action was the one appealed to this court, and the statement we have quoted from the opinion has reference to this state of facts. It differs from the case at bar in two essential particulars. Here the original action was prematurely brought; there the action was timely. Here the defendant did nothing but insist upon its strict legal rights; there it denied the issuance of a policy upon the property destroyed, and compelled plaintiff to resort to an equitable suit for reformation before he could recover; and suit was brought on the policy as reformed within thirty days after the decree was rendered. Moreover, it affirmatively appears from the opinion that the question as to the inapplicability of section 2537 was not raised; and the statement we have quoted is practically all that is said regarding the matter. The *Archer Case* in no manner decides the question. This statement appearing therein, "This section does not enlarge or extend the statutes of limitations but simply provides that another action may be brought and maintained if the original action could have been brought and maintained if commenced at that time,"

has reference to section 2844 of the Code, and not to section 2537; and what is said regarding section 2537 relates to the ordinary statutes of limitations. In the cases of *Heusinkveld v. Insurance Co.*, 95 Iowa, 504 (64 N. W. Rep. 594), and *Wilhelmi v. Insurance Co.*, 68 N. W. Rep. 782, we assumed, without deciding, that section 2537 applied to contract limitations, but in each case we held that the statute did not save the action. A re-hearing has been granted in the *Wilhelmi Case*, and it is no longer authority. In the *Heusinkveld Case* we said, in effect, that it was unnecessary to decide the question, for that plaintiff was guilty of such negligence as barred him of relief. In no case, then, unless it may be in *Jacobs v. Insurance Co.*, have we squarely decided the question presented by this record; and if it be said that the *Jacobs Case* is in point, and holds to a contrary doctrine from that announced in this opinion, it is to that extent overruled. The record in this case clearly shows that plaintiff failed in his original suit because of negligence in prematurely prosecuting it. No excuse for his haste is shown. In view of these facts, we might well have found that he did not bring himself within the statute, and abstained from deciding the point as to the applicability of the statute relied upon to such cases. We have thought it advisable, in view of the great number of cases which are continually arising, wherein it is sought to make this statute applicable, to authoritatively decide the question, and thus put it at rest. Our conclusion is that this statute does not apply, as a general rule, to limitations by contract; and it follows that plaintiff's action is barred.—REVERSED.

KELLEY, MAUS & COMPANY, Appellants, v. J. H. ANDREWS, Defendant, MARY E. ANDREWS, Garnishee.

Husband and Wife: PRIVILEGED COMMUNICATIONS. The rule that
 2 statements made in the hearing of others by a husband or wife as
 3 to conversations between them are admissible does not apply to
 testimony of a spouse given on a former trial, though in the pres-
 ence and without the objection of the other.

WAIVER: Failure to object. The right of a wife to object to her
 2 husband testifying as to communications between them (Code,
 3 section 8642) in an action against her, is not waived by failure to
 object to his testifying as a witness for the adverse party on a
 former trial of the action, if objection is made when it is attempted
 to use such testimony on a second trial.

Agency of Husband. The fact that a husband was agent for his wife
 2 in respect to the transactions sought to be inquired about does
 3 not make him competent to testify against her as to his relation
 to her as such agent; Code, section 8643, providing that neither
 spouse can be examined as to any communication between them.

SAME. Agency of a husband for his wife in executing a mortgage to
 6 her to secure a loan is not shown, so as to charge her with his
 fraudulent intent in so doing, merely by her testimony that she
 always expected him to secure her, and intended to be secured.

Mortgage: DESCRIPTION. A mortgage of "all notes and books of
 4 account and the claims represented thereby," sufficiently describes
 the property mortgaged, as between the parties.

CURE BY DELIVERY. A defective description of personality in a
 5 mortgage is cured by subsequent delivery of the personality to the
 mortgagee, as against the creditors of the mortgagor who had no
 right or interest in the property at the time of the delivery.

Issue on Garnishment: RECALLING GARNISHEE. Plaintiff's motion
 1 for leave to further examine the garnishee, made on a jury trial
 of issues joined on the garnishee's examination, is properly
 denied, since new issues might be opened, and the examination of
 the garnishee is not a matter for the jury.

Appeal from Boone District Court.—HON. S. M.
 WEAVER, Judge.

WEDNESDAY, MAY 12, 1897.

102 119
 110 484

102 119
 114 647

102 119
 115 681

102 119
 117 697

102 119
 121 709

102 119
 131 60

PLAINTIFF, a judgment creditor of the defendant, caused notice of garnishment to be served upon Mary E. Andrews, as a supposed debtor of the defendant. The garnishee answered, and issues were joined on her answer. The case was transferred to, and tried as in equity, and, on appeal, reversed. See 94 Iowa, 484 (62 N. W. Rep. 853). The case was re-tried to a jury, and a verdict and judgment rendered in favor of the garnishee. Plaintiff appeals.—*Affirmed*.

J. M. Goodson and Whitaker & Dale for appellants.

Jordan & Brockett for appellees.

GIVEN, J.—I. It is not necessary that we set out the pleadings or proofs. The following statement of facts will be sufficient for the purpose of the questions to be considered: Defendant, J. H. Andrews, was for a number of years engaged in the retail hardware business in Boone, Iowa. He became indebted to his wife, this garnishee, for borrowed money, and executed to her a chattel mortgage upon his stock of hardware, notes, books of account, and other property described, to secure the same, and also conveyed to her certain real estate. Mrs. Andrews took possession of the property described in the mortgage, by virtue thereof, and afterwards sold it at public sale, and bid it in at ten thousand dollars. Plaintiff contends that these conveyances and transactions were to hinder, delay, and defraud the creditors of the defendant, and that the garnishee should be held to be indebted to the defendant to the value of the property so received by her, and to pay to the plaintiff the amount of its judgment against the defendant.

II. Plaintiff first introduced in evidence the answer of the garnishee, and then “asked leave to recall Mary E. Andrews for further examination as

garnishee." This the court refused to permit, for the sufficient reason that the issues had been
1 joined, and to permit a further examination of Mrs. Andrews, as garnishee, might open up new issues, and for the further reason that the examination of a garnishee is not a matter for a jury.

III. On the former trial, J. H. Andrews was examined as a witness on behalf of the plaintiff, Mrs. Andrews being present, and not objecting; and his testimony was taken down by the reporter. On
2 this trial, plaintiff called Mr. Andrews as a witness, whereupon Mrs. Andrews objected to his examination, upon the ground "that he is the husband of garnishee, and is incompetent, under the statute, to testify in this proceeding." Counsel for plaintiff stated that the purpose of calling Mr. Andrews was to ascertain matters relating solely to his relation, as agent for his wife, in these transactions. The objection was sustained, and thereupon the plaintiff offered to read in evidence the testimony of Mr. Andrews taken on the former trial. To this the same objection was made, and the further one that the witness was present in court. These objections were sustained, and thereafter plaintiff called persons who were present at the former trial, and sought to prove by them statements made by Mr. Andrews in his examination on that trial, and to this like objections were sustained. These rulings were correct. "Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married." Code, section 3642. The examination sought to be made was as to these transactions between Mr. and Mrs. Andrews, and was clearly within the prohibition of said section.
3 This being true, the transcript of the evidence was incompetent. While it is true that statements made by husband or wife as to communications

between them, in the hearing of others, are admissible under some circumstances, they are certainly not when the statement is made in giving testimony. Silence under such circumstances should not be construed as assent. That Mr. Andrews acted as agent for his wife as to all or a part of these transactions does not limit the application of the statute. Plaintiff cites *McKinney v. Railroad Co.*, 104 N. Y. 352 (10 N. E. Rep. 544), holding, in effect, that a party who waived his right to object to evidence privileged by statute could not object to the same evidence on a second trial. In that case, the party having the right to object introduced the privileged evidence. In this case it was by the other party.

IV. At the close of the evidence, plaintiff moved for a judgment against the garnishee on her answer and the evidence, and assigns the overruling of said motion as error. The mortgage to garnishee
4 describes, among other things, "also all notes and books of account and the claims represented thereby." The evidence shows that there came into the hands of garnishee notes and accounts largely in excess of the amount of plaintiff's judgment. The grounds of the motion are that these notes and accounts were not sufficiently described in the mortgage to entitle garnishee to them, under it; that the indebtedness to her was fully paid; and that said notes and accounts were not included in the sale to her under the mortgage. Concede that the description of the notes and books of account is not sufficient as to third persons without notice; it was sufficient as
5 between the parties to the mortgage. It appears that, prior to the service of the notice of garnishment, garnishee had taken possession of the mortgaged property, including these notes and books of account, and had caused said property to be sold, and had bid the same in. "A defective description

may be cured by a subsequent delivery of the property to the mortgagee, as against persons who have not acquired any right or interest before such delivery." Jones, Chat. Mortg. section 60. Plaintiff had not acquired any right or interest in these notes and accounts at the time they were delivered to the mortgagee, and, by the delivery, it had notice as to what particular notes and books of account were covered by the mortgage. We do not think the evidence sustains the claim that the indebtedness to garnishee was fully paid, aside from these notes and accounts, nor that they were not included in the public sale of the mortgaged property. There was no error in overruling the motion.

V. Plaintiff contends that the verdict is contrary to the evidence, in that it finds that the mortgage is valid, and that the garnishee is not indebted to the defendant. It is urged that the mortgage was for an amount greatly in excess of the indebtedness to garnishee; that it was given to hinder, delay, and defraud creditors, and with the agreement that it should be kept secret, and withheld from record, and in fraud of creditors; also, that the sale of the mortgaged property was irregular and void. We will not discuss the evidence bearing upon these several propositions. It is sufficient to say that we think the verdict as to each has such support as that we should not disturb it.

VI. Appellant asked three instructions, in effect as follows, which were refused, and the refusal is assigned as error: The first is that the relationship between Mr. and Mrs. Andrews should be considered in determining whether the transactions in question between them were in good faith, and that, if in good faith, the relationship would not render them
6 less binding; the second, that fraud may be found from circumstances; and the third, "that, if J. H. Andrews acted as agent of garnishee in the

making and execution of the mortgage, then his acts were her acts, and, if he fraudulently made such mortgage, then she would be chargeable with his intent to defraud his creditors." This, it is said, is based upon the evidence of garnishee that she "always expected him to secure her," and that she "intended to be secured." Such an expectation and intention do not show an agency on the part of Mr. Andrews in executing the mortgage, and therefore the third instruction asked was properly refused. The subject-matters of the first and second were fully embraced in those given, and therefore there was no error in refusing to give them.

Appellant complains of the sixth instruction given, because it "utterly ignored the irregularity of the sale." There was no evidence of such irregularity in the sale as to call for an instruction on that subject. In the seventh instruction the jury was told that, in determining the question of fraud, they should, with other matters mentioned, consider "the manner in which the foreclosure was made and the sale thereunder conducted." This was sufficient on this subject.

These conclusions fully answer other complaints against the instructions given. We find no error in the record before us, and the judgment is therefore **AFFIRMED.**

HORACE LEACH, *et al.*, v. THE GERMANIA BUILDING ASSOCIATION OF CLINTON, IOWA, Appellant.

Mandate and Proceedings Below: SUPPLEMENTAL PETITION: *Partition.* Where a decree in partition, fixing the respective interests of the parties, and, as incidental relief, allowing plaintiffs for rents and profits up to the time of the trial, was modified on appeal, as to said interests, and remanded for proceedings in accordance with the opinion, a supplemental petition filed in the lower court, alleging defendant's continued possession of the property after the trial, and requiring him to account for rents and profits accruing since that time, did not set up a new cause of action, and the relief so demanded was properly given on final decree.

Appeal from Clinton District Court.—HON. C. M. WATERMAN, Judge.

WEDNESDAY, MAY 12, 1897.

IN an action for partition of certain lots in the city of Clinton, the district court decreed that the plaintiffs were the owners of an undivided two-thirds thereof, and the defendant of the remaining one-third, and, in the adjustment of the equities, allowed for rents and profits up to the time of the trial, September 19, 1892. The supreme court, on appeal, so modified this decree as to declare plaintiffs entitled to an undivided four-ninths interest in the lots, and the defendant to the remaining five-ninths thereof. When *procedendo* was filed, and the case re-docketed in the district court, but before decree was entered in accordance with the mandate of the supreme court, the plaintiffs filed a supplemental petition, alleging that the defendant had occupied the lots in controversy since September 19, 1892, and asking that it be required to account for the rents and profits since that

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time. The defendant moved to strike this from the record, on the ground that it set up a new cause of action, and could not be heard in the case, after the proceedings referred to. The motion was overruled, and the defendant, the Germania Building Association, appeals.—*Affirmed*.

Walliker Bros. for appellant.

Calvin H. George for appellees.

LADD, J.—The fact that the case was appealed to the supreme court, and remanded for further proceedings, does not, alone, require the denial of additional relief. *Jones v. Clark*, 31 Iowa, 497; *Fisher v. Holden* (Mich.) 47 N. W. Rep. 1063. In such case, however, greater care should be exercised in granting it. Parties will not be permitted to plead a new cause of action in a supplemental petition. *Bank v. Shoemaker* (Pa. Sup.) 2 Am. St. Rep. 649, (11 Atl. Rep. 304). And when facts are alleged occurring since the beginning of the action, and there are no new parties, it will be read with the original petition, and the two considered as one pleading. *Straughan v. Hallwood* (W. Va.) 8 Am. St. Rep. 229, (4 S. E. Rep. 394). The ordinary use of the supplemental petition is in alleging facts transpiring after the beginning of the action, or which were not known at that time, tending to strengthen or re-enforce the cause of action, or to enlarge the extent of, or change, the relief sought. *Sigler v. Gondon*, 68 Iowa, 441 (27 N. W. Rep. 372); *Hervey v. Savery*, 48 Iowa, 313; *City of Davenport v. Mitchell*, 15 Iowa, 194; *Seevers v. Hamilton*, 11 Iowa, 66; *Nave v. Adams* (Mo. Sup.) 17 S. W. Rep. 958; *Candler v. Pettit*, 19 Am. Dec. 399. Whether a supplemental petition may be filed is largely within the discretion of the court. *State v. Williams*, 90 Iowa.

513 (58 N. W. Rep. 904). The relief sought in this case comes clearly within these established rules. After the entry of the decree in the district court, September 19, 1892, the defendant continued in the possession of the property, and enjoyed its use until the *procedendo* was issued, and the case re-docketed for "proceedings to be had in said court, not inconsistent with the opinion of the supreme court," as found in 64 N. W. Rep. 790. The main contention in the case was with reference to the respective interests of the parties in the lots in controversy, and the adjustment of the other equities was only incidental to this issue. The defendants have been in continual occupancy during the litigation,—for three years and three months,—and it is only just that the rents and profits accruing during this long period, should be taken into consideration in entering the final decree. These were not involved in the original action, and the remark in the opinion relied on, is no more than a statement to that effect. The plaintiffs are entitled to additional relief, and no good reason appears for sending them out of court, to immediately return for the purpose of litigating this very matter. The ruling was right.—AFFIRMED.

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THE IOWA RAILROAD LAND COMPANY, Appellant, v.
SAMUEL T. DAVIS.

Taxation: PUBLIC LANDS: *Patent.* A pre-emption claim was canceled, and the land certified to the state, which patented it to a railroad company. The pre-emption claimant, however, refused to receive back the payments which had been made by him, and insisted on the validity of his claim; and subsequently the certification was canceled, and a patent issued to him. *Held*, that the United States did not hold the title in trust after the certification, and the land became taxable from that time.

VOLUNTARY PAYMENT: *Mistake of law.* Where the railway company, after the annulment of the certification and the issuance of the patent to the claimant, and after decisions of the general land office of the United States supreme court against the contention on which it based its claim, paid taxes on the land, long before they became delinquent, and without the claimant's consent, it can not recover the amount paid from the claimant.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

THURSDAY, MAY 13, 1897.

Suit in equity to recover for taxes paid by plaintiff and its assignors upon certain lands in Woodbury county, the title to which at the time the taxes were paid being in dispute, and finally found by this court to be in defendant's grantors (see 72 Iowa, 508, 34 N. W. Rep. 304), this decree being affirmed by the supreme court of the United States (143 U. S. 38, 12 Sup. Ct. Rep. 362). The trial court sustained a demurrer to the plaintiff's petition, and plaintiff appeals.—*Affirmed.*

Chas. A. Clark for appellant.

C. C. Cole, O. C. Treadway, and S. T. Davis (pro se) for appellee.

DEEMER, J.—From the petition we gather the following facts, which are regarded as controlling. On the nineteenth day of July, 1856, Thomas L. Griffey, defendant's grantor, filed a pre-emption claim to certain lands in Woodbury county, in the United States land office, and some time prior to July 7, 1857, made final proofs. On this last-named date the commissioners of the general land office canceled the pre-emption entry and location, but Griffey refused to receive back the payment made by him for the land, and insisted upon the validity of his claim. Afterwards, and on the thirtieth day of June, 1882, the letter of cancellation was withdrawn and set aside, and a patent was issued to Griffey covering the land originally located by him. The plaintiff claimed title to the lands under grant of May 15, 1856, and certified as land in place, April 7, 1863. After the completion of the railway, and on July 5, 1871, the land was patented by the state to the railway company. It appears that the railway was surveyed past the land in question July 5, 1856, but the plat of this survey was not filed with the state department until October 2, 1856, nor was it filed in the United States land office until October 13, 1856. In the case of *Land Co. v. Griffey*, 72 Iowa, 505 (34 N. W. Rep. 304), being a controversy between plaintiff's assignor and the defendant's grantor,—we held that the railroad company acquired no interest in the land until a plat of the survey was filed in the general land office at Washington; following a line of decisions commencing with *Railroad Co. v. Grinnell*, decided June 14, 1879, and reported in 51 Iowa, 476 (1 N. W. Rep. 712). We further held that until the plat was so filed the land was open to pre-emption, and that since, before such plat was so filed, defendant had obtained a valid pre-emption right, upon which he afterwards procured

a patent, his was the better title. This case was affirmed by the supreme court of the United States, the opinion being found in the case referred to in the statement preceding this opinion. 143 U. S. 38;

2 (12 Sup. Ct. Rep. 362). The land was taxed for the year 1871, and for each and every subsequent year down to and including the year 1890, and the taxes so assessed were paid by the plaintiff and its assignors. These taxes were, as a rule, paid before the first day of March of the year succeeding the levy, and all except two small items were paid prior to the first day of April. The petition alleges that plaintiff and its assignors supposed and believed, until the adverse decision against it in the supreme court of the United States, that it was entitled to the land under the act of congress approved May 15, 1856, and that the taxes were paid in good faith; each and all believing that it was the lawful owner of the land, and held the same by good and indefeasible title. Davis acquired title to the lands by virtue of certain mesne conveyances from Griffey, and with full notice and knowledge that plaintiff and its assignors had paid the taxes thereon. This suit is for an accounting as to the taxes paid, for judgment for the amount thereof, and to establish a lien to the amount of the judgment against the land. The demurrer is the general equitable one, and further says that all claims for taxes paid prior to the year 1887 are barred by the statute of limitations. Another ground of the demurrer is that the lands were not taxable prior to the year 1883, and plaintiff is not entitled to any relief for taxes paid prior to that date. The trial court found that plaintiff's title was and is absolutely null and void, and that it and its grantors paid the taxes under a mistake of law, and are not entitled to recover. It also found that the lands were not subject to taxation prior to the year 1882, and that in no

event would defendant be liable for taxes paid by plaintiff or its assignors during the years 1871 to 1882, inclusive.

Appellant's counsel in argument first attacks this last conclusion of the court, and, following the order adopted by him, we turn our attention to this proposition. The conflicting claims of the par-

3 with reference to this point may be stated as follows: Appellant contends that, when one acquires a vested right to a patent for lands, it is the equivalent of a patent actually issued, and, when the patent does issue, it relates back to the inception of the right of the patentee, and he takes the legal title, by relation, from the date of his original right thereto, and that under the facts of this case the legal title to the land was in defendant and his grantors from the year 1856, and was taxable from and after that year. It also contends that, if it be held that the lands claimed under the land grant were not taxable until the patent issued, as the state patented the land to plaintiff's assignors in the year 1872, it was taxable for that and subsequent years. While, on the other hand, appellee's counsel contend that the lands were not taxable until the patent issued to Griffey, for the reason that prior thereto, and during the controversy between the parties as to the title to the land, the United States held the title in trust for the party entitled thereto, and that while so held the land was not subject to taxation. Neither party disputes the proposition of law made by the other, and the case turns upon this one proposition, did the United States hold the title in trust prior to the time it issued the patent to Griffey? Answer to this question depends upon the solution of the question as to whether the government held the legal title to the land after it certified the same to the railway company. The petition recites that the secretary of the

interior certified the land to the state of Iowa April 7, 1863, and that the state patented the same to plaintiff's assignors July 5, 1871. Now, it has frequently been held that such certification and patent operate to transfer the legal title, subject to be decreed to another who subsequently shows himself entitled thereto. The legal title passed to the plaintiff's assignors, and the lands were clearly taxable from that time on. *Chicago, R. & M. R. Co. v. Carroll County*, 41 Iowa, 153; *Land Co. v. Antoine*, 52 Iowa, 429 (3 N. W. Rep. 468); *American Emigrant Co. v. Iowa R. L. Co.*, 52 Iowa, 326 (3 N. W. Rep. 88); *Mower v. Fletcher*, 116 U. S. 385 (6 Sup. Ct. Rep. 409); *Williams v. U. S.*, 138 U. S. 516 (11 Sup. Ct. Rep. 457); *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 112 U. S. 176 (5 Sup. Ct. Rep. 84). The cases of *Land Co. v. Fitchpatrick*, 52 Iowa, 244 (3 N. W. Rep. 40); *Iowa Homestead Co. v. Webster County*, 21 Iowa, 221; *Dickerson v. Yetzer*, 53 Iowa, 681 (6 N. W. Rep. 41); *Doe v. Land Co.*, 54 Iowa, 657 (7 N. W. Rep. 118); and *Grant v. Land Co.*, 54 Iowa, 673 (7 N. W. Rep. 113),—are not in point, for the reason that in none of them was the land certified by the general government, and patented by the state. On the contrary, in each case the title was withheld by the general government pending a controversy between conflicting claimants, and it was thought improper to hold that the land was subject to taxation and to tax sales while the United States had a duty to perform in regard to it. It is clear that the land was taxable after its certification by the general government. Whether it was taxable from the time Griffey was entitled to receive his patent we need not determine, for no taxes were levied until after the United States had certified the lands, and transferred the legal title to the railroad company. The case of *Wood v. Curran*, 76 Iowa, 562 (41 N.

W. Rep. 214), is not in conflict with the views herein expressed.

Appellant's next point is that it paid the taxes in good faith, and that under the doctrine announced in *Goodnow v. Moulton*, 51 Iowa, 555 (2 N. W. Rep. 395),

and other like cases, it is entitled to recover
4 the amount thereof, with interest, and to establish the amount of such payments as a lien upon the land. To this appellee responds by saying that the taxes were paid under a mistake of law; were paid voluntarily with full knowledge of all the facts, and without the request or consent of the owner of the land, in violation of a right given by statute to the owner, not in good faith, but with knowledge that their title was void, and that claims for all taxes paid prior to the year 1887 are barred by the statute of limitations. Appellee confidently relies upon the cases of *Garrigan v. Knight*, 47 Iowa, 525; *Montgomery County v. Severson*, 68 Iowa, 451 (27 N. W. Rep. 377); *Read v. Howe*, 49 Iowa, 65; *Barr v. Patrick*, 59 Iowa, 134 (12 N. W. Rep. 805); *Dubuque & S. C. R. Co. v. Board of Supervisors*, 40 Iowa, 16. In the case of *Garrigan v. Knight*, *supra*, we held, following, as we now believe, the general current of authority, that "when the title to real estate is in controversy, and one of the parties pays the taxes, and is afterwards unsuccessful in his claim of ownership, he cannot recover the taxes thus paid." It was also said in that opinion that "the mere fact that plaintiff knew the defendant was paying the taxes under claim of title is not sufficient from which to infer a promise." This case was followed in *Read v. Howe*, *supra*. In the case of *Goodnow v. Moulton*, *supra*, we modified this general rule, and held that in some cases one who pays taxes upon lands believing in good faith that he is the owner thereof may recover them of the successful litigant for the title. In that

case we said, however: "It was not until 1872, that there was an authoritative decision adverse to those claiming under the railroad grant. Under these circumstances, the Homestead Company was fully justified in believing that it was clothed with the legal title. By no amount of care and diligence could it have arrived at any other conclusion. The title was in great doubt, and nothing, under the circumstances, short of a decision of the supreme court of the United States, could reasonably be expected to settle the question. Until such decision was made, it was the duty of parties claiming under both these grants to pay the taxes. Either was fully justified in so doing. The circumstances are peculiar and anomalous, and demand the establishment or recognition of a rule consonant with law, equity, justice, and common honesty. That the defendant should reimburse the plaintiff for the taxes paid, there can be no doubt, unless there is some well-recognized principles which forbids it. We do not believe there is any such. The foregoing views do not conflict with *Garrigan v. Knight*, 47 Iowa, 525. In that case the plaintiff purchased his land from the general government. About his title there could be no dispute. This the defendant was bound to know. The latter, in fact, had no title, and this he was bound to know. Any one having ordinary knowledge of the law could and would have so advised him. The defendant, without inquiry or the use of ordinary diligence, paid the taxes. The payments, under such circumstances, were made officiously, and by an intermeddler." The *Goodnow Case* has since been followed in a number of cases, most, if not all, of which involved the same controversy, and were attended with the same peculiar circumstances. *Goodnow v. Oakley*, 68 Iowa, 27 (25 N. W. Rep. 912); *Goodnow v. Stryker*, 62 Iowa, 221 (14 N. W. Rep. 345, and 17 N. W.

Rep. 506); *Goodnow v. Litchfield*, 63 Iowa, 282 (19 N. W. Rep. 226); *Bradley v. Cole*, 67 Iowa, 652 (25 N. W. Rep. 849); *American Emigrant Co. v. Iowa Railroad Land Co.*, 52 Iowa, 327 (3 N. W. Rep. 88); *Fogg v. Holcomb*, 64 Iowa, 628 (21 N. W. Rep. 111); *Merrill v. Tobin*, 82 Iowa, 534 (48 N. W. Rep. 1044). In the case of *Goodnow v. Wells*, 76 Iowa, 774 (38 N. W. Rep. 172), we said, while following the *Goodnow-Moulton Case*, "There are members of this court who think the cited case of *Goodnow v. Moulton* was incorrectly decided." Without now questioning the soundness of the original *Goodnow Case*, it is sufficient to say that we are not in favor of further extending the rule; and that to entitle one to recover taxes paid on the land of another, the equities must be strongly in his favor, and the facts must be such as to bring the case clearly within the rule announced in the *Goodnow Cases*. It was certainly the duty of the railway company to pay the taxes assessed against the land while the legal title was in it; that is to say, down until the time the patent issued to Griffey, which was in the year 1882. At this last-named date the land department of the United States government rescinded and annulled the certification of the lands, reinstated Griffey's pre-emption, and issued him a patent for the land, which was recorded on the seventh day of July, 1882. The plaintiff and its grantors paid the taxes before the right of the owner to pay without incurring liability for interest had expired, and long before any sale of the land for taxes could have been made. Davis did not acquire any interest or title to the lands until the year 1887. The petition alleges that the attorney general of the United States held and decided in the year 1857 that the lands in question were not subject to pre-emption or selection or location by pre-emptors after the line of road from Dubuque to Sioux City was definitely fixed by

being surveyed and staked out, and the commissioners of the general land office of the United States, in accordance with such decision of the attorney general, uniformly held that such lands were not subject to pre-emption, and canceled,—erroneously, as it has since turned out,—the pre-emption of Griffey for that reason. But that plaintiff, and those under whom it claims title, always relied upon the decision of the attorney general and the action of the general land office in administering the grant, and each and all of them honestly believed that they had good and perfect title to said land until the decision of the United States supreme court aforesaid. The petition also recites as we have before stated, that the land and interior departments of the United States reversed this holding of the attorney general and the action of the land commissioner canceling and annulling the pre-emption of the land by Griffey, rescinded and annulled the erroneous certification of the land to the state, and issued a patent for the land to him, which was recorded in the year 1882. From and after this date, if not before, it was the duty of Griffey and his grantors to pay the taxes assessed against the land. It thus appears that the title under which the plaintiff and its grantors claimed was adjudged to be void and canceled by the very authorities on whose opinion they say they relied at the time they paid the taxes assessed and levied after the year 1882. Moreover, this court had held, as early as the year 1867, “that simply staking and surveying the land fixes nothing, and it is not sufficient” as against a pre-emption right. See *Fremont County v. Burlington & M. R. Co.*, 22 Iowa, 96. This decision was affirmed by the supreme court of the United States in the year 1870. See 9 Wallace, 89. Again, in *Railroad Co. v. Grinnell*, 51 Iowa, 476 (1 N. W. Rep. 712), decided in the year 1870, we said that the survey and location of the railroad, and the filing

of a map thereof in the proper office, designated the lands in the six-mile limits, to which the grant at once attached. This case was also affirmed by the supreme court of the United States. 103 U. S. 739. Not only had the various departments of the general land office, upon whose opinions the plaintiff's grantors relied, decided against the validity of its claim, but all the courts of the country had, so far as they had spoken, determined that the mere staking and location of the road was not sufficient to carry the title. With this knowledge, plaintiff and its grantors paid the taxes, and in nearly every instance paid them long before the first day of April, at which time penalties commenced to run. Under such circumstances, there certainly was no implied request from the defendant or his grantors, that they should be paid by the plaintiff or its assignors, and made a charge upon the land. The payments made by plaintiff and its grantors were due to ignorance or mistake of law, pure and simple; and for the protection of what they erroneously believed to be a good title. In none of the cases cited by appellant has a party been allowed to recover taxes paid after the question of title was finally settled, and in each and every case the payment of taxes was made in good faith, and in the honest belief on the part of the payer that he held title to the lands. In the case at bar, plaintiff's assignors obtained such title as they had direct from the general government. They in fact had no title, and whether they were bound, as a matter of law, to know it or not, they had notice from the general land office that it was of no validity, and that the certification of the lands had been withdrawn. They were also informed by the decisions of this court, as well as those of the supreme court of the United States, that they had no title. Yet without inquiry or the use of ordinary care and diligence, they paid the taxes,

These payments were also made long before any penalties attached; thus, to a certain extent, depriving the owner of his opportunity to pay. If under such circumstances, plaintiff is allowed to recover, then any intermeddler who officiously appears and pays taxes upon land before the time when landowners generally pay their taxes, may recover taxes paid. Surely courts will not give countenance to a rule which will make one the debtor of another under such circumstances. We will not undertake to review all the cases cited by appellant's counsel, nearly all of which were decided with reference to the peculiar facts appearing in each case. It is sufficient to say that we think this case is barren of such equities as, in a certain line of cases, have been held exceptional to the general rule announced in *Garrigan v. Knight*, 47 Iowa, 525.

We have already suggested a fact which we regard of special significance, and that is that plaintiff and its assignors paid the taxes long before any penalty attached, and in some instances as early as January in each year. Griffey and his grantees were the persons who should have paid the taxes on the land after the year 1882. Now the statutes give them the right to pay the taxes to the county treasurer. They had the right to pay them without penalty, under the present law, at any time prior to the first day of April in each year, and might also have paid them, with interest and penalty, at any time before sale. After sale they held the right to redeem, and, at any time within five years after the tax deed issued, could have contested the validity of the sale. The statute gives to no one else these rights, and does not expressly sanction the payment of taxes by any one save the owner of the land. From the allegations of the petition, it will be seen that plaintiff and its grantors paid the taxes after they knew that the

land department had determined they had no title, and after the courts had said that titles similar to theirs were of no validity as against a pre-emption claim. They paid the taxes before the owner was bound to pay in order to save penalties, and by so doing deprived him of the rights given by statute, to which we have just referred, and are now attempting to fix another and different penalty than that provided by these statutes for the non-payment of taxes. If we allow the plaintiff to recover, we say, in effect, that any one may officiously pay taxes for another at any time after they are due, and before penalty attaches against the owner, and that it then becomes the duty of the owner to hunt up this intermeddler and reimburse him, with interest. There is no showing in the petition that plaintiff or its grantors were required to pay these taxes at the time they did in order to save or protect their legal title. Indeed, the contrary appears, for they were paid long before they became delinquent. It does not appear that defendant or his grantors had at any time refused, or even determined not, to pay, or that he or they would not have paid before there was any danger to the title. Why, then, infer any request from the owner to pay them? Do not the circumstances negative any such implied request? We think they do, and are firmly convinced that there is no equity in plaintiff's claim for taxes paid after the year 1882. As plaintiff is not entitled to recover for these taxes, its claim for taxes paid prior to that time cannot be considered, for it is barred by the statute of limitations.

We are aware that some of the statements made in this opinion are in conflict, or apparent conflict, with what has been said in some of the *Goodnow Cases*, or other cases following them; but, as we have said at the outset, we are not in favor of extending the rule

announced in the original case any further, and in order for a plaintiff who has paid taxes upon another's land to recover, he must bring himself clearly within the exception to the general rule first announced in the case of *Goodnow v. Moulton*, *supra*. This whole exception is based upon the maxim, "*Ex æquo et bono*," and where the reason for the rule fails the rule itself should be held inapplicable. The judgment of the district court is **AFFIRMED**.

G. B. GOIN, Appellant, v. W. C. HESS.

Land Sale Commissions. One employed to sell land at an agreed price
 4 and receive in part payment land of a certain character within
 5 a specified locality, cannot recover commissions where the owner
 refuses to consummate the trade, if the contract of employment
 provided that the sale should be subject to the owner's approval.

OTHER AGENTS. Evidence that a third person was authorized to act
 3 for defendant in effecting a sale of land is admissible in an action
 against him for commissions in procuring the sale, where there is
 evidence that such third person had done some of the work in
 connection with the sale—and not otherwise.

EVIDENCE. Evidence as to the quality and value of defendant's farm
 1 is inadmissible in an action for commissions in finding a pur-
 chaser for the land, at a specified price per acre fixed by defendant.

Same. Evidence of the value of the land at the time of the trial is
 2 inadmissible, in the absence of evidence that the value had not
 changed since the time of the transactions in regard thereto, for
 which suit is brought.

Instructions: NUMBERING. The court should number the paragraphs
 6 of the charge. Whether failure so to do is ground for new trial,
 is not decided.

Appeal from Crawford District Court.—HON. C. D.
 GOLDSMITH, Judge.

THURSDAY, MAY 13, 1897.

ACTION at law to recover for services alleged to have
 been rendered by the plaintiff in finding a purchaser

for land. There was a trial by jury, and a verdict and judgment for the defendant. The plaintiff appeals.—*Reversed.*

Shaw & Kuehnle for appellant.

J. P. Conner for appellee.

ROBINSON, J.—The petition contains two counts, although recovery is sought upon but one. The first count alleges that the defendant employed the plaintiff, by verbal agreement, to sell or trade three hundred and sixty acres of land described, which were owned by the defendant, at the price of thirty-five dollars per acre; that the defendant agreed to take in part payment for his land one hundred and sixty acres of good land lying anywhere within four or five miles of Charter Oak, in Crawford county, which was reasonably worth thirty-five dollars per acre, and would rent for from two dollars and fifty cents to two dollars and seventy-five cents per acre per annum, and the remainder of the price of his land, after deducting incumbrances, was to be secured by mortgage bearing seven per cent. interest, and that for making such a sale or exchange the defendant agreed to pay the plaintiff a commission of two hundred dollars. The count further alleges that the plaintiff made a trade of the land of the defendant, on the terms authorized, with one Anton Jobgen, who was to give one hundred and sixty acres which he owned, within three miles of Charter Oak, in part payment for the land of the defendant; that the defendant was satisfied with the Jobgen land, but refused to carry out the trade on his part, and refused to pay the plaintiff his commission. The second count seeks a recovery on the same transaction for the reasonable value of the services alleged to have been rendered by the plaintiff. The answer

of the defendant contains a general denial; admits that the defendant had some talk with the plaintiff about trading the farm of the defendant for another, but avers that the farm for which the defendant would trade was to be good, smooth level land, free from liens, and satisfactory to him; that he was not satisfied with the Jobgen farm; that it was incumbered to the amount of one thousand two hundred dollars; and that he never consented to trade for it.

I. The defendant was permitted to show by several witnesses the improvements upon his farm, and its quality and value. The plaintiff interposed timely objections to evidence of that character, but
1 they were overruled. In so ruling the district court erred. The quality and value of the defendant's farm were not in issue, and the testimony received to show what they were, was wholly immaterial. The plaintiff alleges in his petition, and testifies as a witness, that the price which the defendant fixed for his land was thirty-five dollars per acre; and the defendant did not, as a witness, deny that such was a fact. The testimony in question did not relate to any controversy involved in the case, and its natural and probable effect was to confuse and mislead the jury. The cases of *Paddleford v. Cook*, 74 Iowa, 434 (38 N. W. Rep. 137), and *Johnson v. Harder*, 45 Iowa, 677, cited by the appellee, differ from this case, in that each of them involved a dispute respecting the consideration agreed upon for property sold. No question in regard to the price of the defendant's
2 farm is involved in this case. The appellant also justly complains that a witness was permitted to testify as to the value of the Jobgen land at the time of the trial. The testimony of values should have been confined to the time of the transactions in controversy, or it should have been shown that they had not changed.

II. The appellant complains of rulings of the court which permitted the defendant to show that he had employed several agents for the sale of the land, and what he agreed to pay them for finding a
3 purchaser. There was evidence which tended to show that a man named Drake had done some work to effect the trade with Jobgen, and it was proper to show, if it could have been done, that the contract which the plaintiff claims to have made with Jobgen was the result, in whole or in part, of services rendered by Drake. Hence it was proper to show that he was authorized to act for the defendant in effecting a sale. But it was not proper to show that the defendant had employed agents who were not concerned in what was done, and the compensation he had agreed to pay them was wholly immaterial.

III. The plaintiff asked the court to instruct the jury as follows: "If you find from the evidence that the defendant agreed with the plaintiff to pay him a commission of \$200 for finding a purchaser for his farm at an agreed price, and offered to accept as part payment a farm of a certain character, and within a certain radius of the town of Charter Oak, Iowa, and should you find that the Jobgen farm fulfills the requirements of that offer and proposition, then you
4 should find for the plaintiff, notwithstanding the defendant refused to consummate the trade." The contract of sale which the petition alleges that the plaintiff was authorized to make did not require the approval of the defendant, but both the plaintiff and the defendant testified that the sale was to be subject to the approval of the latter, and the contract made with Jobgen provided for such approval. The instruction asked was therefore properly refused.

IV. The third instruction asked by the plaintiff and refused by the court stated, in substance and effect, that a formal approval of the contract was not

required, but that, if the defendant was so far satisfied with the Jobgen land that he was willing to make an exchange of farms upon the terms and conditions arranged by the plaintiff, there should
5 be a verdict for the plaintiff. This instruction was correct, as applied to the issues presented by the pleadings and some of the evidence in the case, but it was properly refused because of the testimony to which we have already referred, that the contract was to be approved by the defendant before it became effectual.

V. The court failed to number the paragraphs of its charge to the jury. They should have been numbered, because section 2788 of the Code requires it, and to enable a ready reference to different
6 portions of the charge. Whether the failure to comply with the statute was a sufficient ground for a new trial, we do not find it necessary to decide.

VI. Other questions presented in argument are disposed of by what we have already said, or are not likely to arise on another trial. For reasons shown, the judgment of the district court is **REVERSED**.

J. B. T. RITCHEY, Appellant, v. F. W. ADLEFINGER AND
R. T. YOUNG.

Appeal from Justice: SIZE OF DISTRICT COURT JUDGMENT: Costs.

In determining whether a judgment for plaintiff on his appeal to the district court is more favorable to him than his judgment in the justice's court, so as to exempt him from payment of costs of appeal (Code, section 3592), interest on the judgment in the justice's court, at the rate fixed therein, from its date to the date of the second judgment, must be included to ascertain the size of the justice's judgment.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

THURSDAY, MAY 13, 1897.

PLAINTIFF brought this action in justice's court to recover two hundred dollars on a promissory note. Defendants admitted the execution of the note, denied that anything was due thereon, and pleaded a counter-claim as a further defense. Plaintiff recovered judgment in the justice's court on June 16, 1894, for one hundred and seventeen dollars and twenty cents, and for eight per cent. interest thereon from that date. From this judgment plaintiff appealed to the district court, in which court on October 28, 1895, judgment was rendered in his favor for one hundred and twenty-five dollars and eighty-seven cents. On October 30, 1895, the defendants moved to tax the costs made in the district court to the plaintiff, upon the ground that he had not obtained a more favorable judgment than that from which he appealed. This motion was sustained, and judgment for costs entered accordingly, from which judgment the plaintiff appeals.—*Affirmed.*

Ayres, Woodin & Ayres for appellant.

A. A. McLaughlin for appellees.

GIVEN, J.—Section 3592 of the Code provides, in cases of appeal from a justice's court, that "the appellant must pay the costs of the appeal, unless he obtains a more favorable judgment than that from which he appealed." The judgment appealed from was not only for one hundred and seventeen dollars and twenty cents, but also for eight per cent. interest on that amount until paid, from the date of the judgment. The judgment in the district court was for one hundred

and twenty-five dollars and eighty-seven cents. The contention is whether, in determining which is the more favorable judgment to plaintiff, interest on the first, from its date, at the rate adjudged, to the date of the last, should be included. This is fully answered in *Traer v. Filkins*, 10 Iowa, 563, wherein the court says: "The judgment in the district court was twenty-nine and one-half cents greater than the one rendered by the justice, the excess being equal to the interest that had accrued from the date of that judgment. We cannot regard the judgment in the district court as a more favorable one to appellant than was given to him by the justice." While it is true, as contended, that that case was upon a different cause of action from this, yet said section 3592 is alike applicable to both. The cause of action does not control the application of that section. The fact that a counter-claim was pleaded in this case does not affect the application of said section. The single inquiry is whether the judgment obtained by plaintiff in the district court is more favorable to him than the one from which he appealed. We think it is not, and therefore defendants' motion was properly sustained.—
AFFIRMED.

STATE OF IOWA V. GEORGE COOPER, Appellant.

Embezzlement: TITLE TO MONEY EMBEZZLED: *Loan agent.* Defendant was employed by prosecuting witness to procure a loan on mortgage. He obtained the desired sum under an agreement that it should be delivered to prosecuting witness, on execution by him of a first mortgage. Prior to such execution he had appropriated the money to his own use. *Held,* that as the money, when appropriated, belonged to the lender and not to the prosecuting witness, defendant was not guilty of embezzling the money of such prosecuting witness.

Appeal from Henry District Court.—HON. F. W. EICH-
ELBERGER, Judge.

THURSDAY, MAY 13, 1897.

THE defendant is accused in the indictment of larceny by embezzlement. From judgment of conviction, sentencing him to serve a term of one year in penitentiary at Ft. Madison, he appeals.—*Reversed.*

Palmer & Palmer and Carr & Parker for appellant.

Milton Remley, attorney general, for the state.

LADD, J.—The defendant is sixty-four years old, and has lived in Henry county fifty-nine years, while the prosecuting witness, Leonard Farr, is eighty-one years of age, and has resided in the same county since 1848. The defendant's wife is a niece of Mrs. Farr, who cared for her from infancy to the time of her marriage, in 1853. From then until the death of Mrs. Farr, in 1893, the families lived on terms of intimacy and mutual confidence. In December, 1893, Farr, who owned considerable land, applied to John F. Leech for a loan thereon, with which he proposed to discharge certain obligations. Leech, having failed to place the loan, suggested that Cooper had said he believed he could get the money for him. Thereupon Farr applied to defendant, saying he desired him to negotiate a loan on his farm. The defendant replied, that he thought he could procure the money from parties at Villisca, and that he would write his son and son-in-law, who lived there, to ascertain. When they next met, about two weeks later, the defendant told Farr he had been to Kansas City to get a loan of five thousand dollars from Frazier, and

got it. Frazier was an old acquaintance of the defendant and the evidence tends to show that the latter represented himself as having been employed by Farr to negotiate the loan. Frazier and defendant entered into an arrangement by which Fred Cooper, a son of the defendant, and Frazier, were to make a joint loan to Farr of ten thousand dollars, of which each was to put in five thousand dollars. On this understanding, Frazier paid Cooper in February, 1894, five thousand dollars, to be turned over to Farr when a clear first mortgage was executed by the latter, and loaned Cooper two thousand dollars, to be used in making up Fred's part of the loan, and thereafter, in the same month, paid an additional two thousand dollars to the defendant to make up his half of a fourteen thousand dollar loan, which he (defendant) represented would be necessary. The motive in making the loan seemed to be that they might finally obtain the land under the mortgage. The defendant paid Farr one thousand three hundred and ten dollars February 17, one hundred and ninety dollars February 19, two hundred and fifty dollars March 14, three hundred dollars March 19, 1894; and, on the receipt of each sum, Farr executed his promissory note to Cooper, payable one day after date. Upon the receipt of the amounts from Frazier, the defendant appropriated to the payment of his own obligations all not paid to Farr prior to April 11, 1894. On that day, Farr executed his note for seven thousand dollars to Frazier, and a mortgage on his land securing the same, which were delivered, through the defendant, to the latter. As Frazier expected a joint note and mortgage to himself and Fred Cooper of fourteen thousand dollars, he at once investigated, and found the mortgage to be third, instead of first. The defendant thereupon borrowed money, and satisfied one of the prior mortgages by the payment of one thousand, two hundred and fifty-five dollars

and eighty-five cents, and, as surety of Farr, executed a bond to Frazier for the payment of the other at maturity. Of the remaining sum, the defendant claims to hold two thousand dollars on an agreement with Farr that it be paid to the nieces of his first wife. For the retention of the balance, one thousand, six hundred and ninety-four dollars and fifteen cents, the record offers no excuse. The defendant claimed to hold it in order to protect himself as surety on the bond, but this was not agreed to, and the law did not permit; nor is it true, in fact, as he had already used it for himself. The indictment charges that defendant received money belonging to Farr, and fraudulently converted it to his own use.

The mere employment to negotiate a loan will not authorize the receipt of the proceeds thereof by the agent for his principal. Mechem, Ag., section 372; *Austin v. Thorp*, 30 Iowa, 376. This at most, was the limit of Cooper's employment by Farr. Frazier gave the money to the defendant, to be turned over to Farr only upon the execution of a clear first mortgage, and, until this was done, the money remained the property of Frazier. Before the execution of the mortgage on April 11, 1894, Farr could not have maintained an action against either Cooper or Frazier for the amount in defendant's hands. It was Frazier's money up to that time, and Farr had acquired no ownership in it. Before the execution of the mortgage by Farr, the defendant had appropriated all the money received; and it was therefore money belonging to Frazier, and not to Farr, which was embezzled. It is said that Farr's right to the money became absolute when the note and mortgage were delivered and accepted; and doubtless, after that time, he could have maintained an action against either Cooper or Frazier for the balance of the loan. But the crime, if any, was at that time complete. After Cooper had appropriated

Frazier's money, the ratification by Farr could not change his acts, so as to relate back and charge him with appropriating Farr's money instead. The latter had the right, upon the execution of the mortgage, to insist upon the payment of the balance by Frazier before its delivery; and the fact that Cooper had a part of the money would not relieve Frazier from payment. The court directed the jury, in substance, that unless the defendant was agent of Farr, and received the money as such agent, and that, when received, it belonged to Farr, he should be acquitted. Clearly, under this instruction, a verdict of not guilty ought to have been returned. As the money when appropriated belonged to Frazier, and not to Farr, the defendant was not guilty of the offense charged in the indictment, and the judgment must be REVERSED.

102	150
123	618
102	150
137	350

WILLIAMSON VAN ORMER V. SUSAN HARLEY, Appellant.

Co-tenancy: DISSEISIN: *Adverse possession.* Possession under deeds
 4 from four of five tenants in common, purporting to convey the
 entire estate, is not such disseisin of the one who did not convey as will start the running of limitations, where grantors and grantees recognize that such co-tenant has an interest, and the grantee makes frequent efforts to buy that interest.

ABANDONMENT BY CO-TENANT. The rights of such co-tenant are not
 5 barred in equity by failure to take active steps for their enforcement, where he did not waive them and the person in possession knew of such rights and that they were not abandoned.

RENT FOR OCCUPANCY. A tenant in common is liable for rent if he
 8 lease the premises to a stranger, but is not liable to pay co-tenants
 9 who do not share the use of the premises, rent for his own occupancy unless he exclude the co-tenants from possession.

TAX SALE AND TAX DEED. A tax sale of lands at the instance of a
 6 tenant in common having possession of the premises, for the purpose of extinguishing the title of his co-tenant, is not, until the
 10 tax deed is made, such an ouster of the co-tenant as to make the
 11 tenant in possession liable to such co-tenant for rent.

SAME. Where the heirs of the co-tenant in possession take, after his death, a conveyance from the grantee in such tax deed, but assert no adverse claim against their ancestor's co-tenant by reason thereof, their possession is not such an ouster of such co-tenant as to render them liable to him for rent.

Adverse possession. A sale of land for delinquent taxes and the issuing of a tax deed therefor in pursuance of a plan of one co-tenant in common in possession, and for his interest, to extinguish the title of his co-tenant, do not create any adverse right against the latter.

IMPROVEMENTS: Partition. Though a tenant in common cannot, as a rule make his co-tenant liable for improvements not consented to by such co-tenant, where the improvements increase the value of the land, and the possession of the tenant making the improvements is not wrongful, equity may allow for such improvements, in partition.

Rents and profits. A tenant in common out of possession who makes no objection to the improvements on the land made by his co-tenant in possession will not be allowed to share in the higher rent made possible by such improvements without paying a share of their cost.

Partition: ADVANCEMENT. The mere fact that a conveyance of land from father to son was intended as an advancement does not prevent the latter from maintaining an action for the partition of other land left by the father on his death.

Evidence. That no consideration was paid for a conveyance of land from father to son, and that the latter did not participate in the distribution of certain land of the father after his death, is evidence that such conveyance was intended as an advancement.

Appeal: MUTILATION OF RECORD. Where appellant's counsel, without leave, removed certain exhibits from the transcript after it had been used by the court below, but the transcript as certified appears to contain all such exhibits, and no application was made below to correct the supposed deficiencies, a motion to strike out the evidence because of the alleged mutilation of the records will be denied.

Appeal from Ida District Court.—HON. Z. A. CHURCH,
Judge.

FRIDAY, MAY 14, 1897.

ACTION in equity for the partition of real estate and for an accounting. There was hearing on the

merits, and a decree for the plaintiff. The defendant appeals.—*Modified and Affirmed.*

Warren & Johnston for appellant.

F. F. Kiner and *C. W. Rollins* for appellee.

ROBINSON, J.—In the year 1863, Amos Van Ormer, a resident of the state of Pennsylvania, died intestate, seized in fee simple of a tract of one hundred and twenty acres of land in Ida county, in this state. He had survived his wife, and his only heirs were his children, who were the plaintiff, and four daughters, named Hannah, Jane, Lucinda, and Mary. In April of the year 1875, Jane, Lucinda, and Mary, then married, and their husbands, executed to Jacob Feghtly, a resident of the state of Illinois, a warranty deed, which purported to convey to him “the undivided three-fourths” of the land in question. In the same and subsequent years, the heirs of Hannah, who had married and was then dead, executed to Feghtly deeds which purported to convey in the aggregate an undivided one-fourth of the land. In the year 1882, Feghtly caused the land to be broken, and during the next year erected thereon a dwelling house, barn, granary, and other improvements, at a cost of about eight hundred dollars. In 1887 he died, testate, having devised the land in question to his sister, Sarah Sigman, and to his niece, the defendant, in equal shares. In the year 1884 the land was sold for delinquent taxes, and in June, 1889, a tax deed therefor was issued. In September, 1890, Sarah Sigman executed to the defendant a conveyance which purported to convey an undivided one-half of the land; and in September, 1894, the defendant acquired the interest which had been conveyed by the tax deed. The plaintiff claims that he has never parted with his

interest in the land, and that he is the owner of an undivided one-fifth thereof. He asks that his share be set apart; that he have an accounting of the rents and profits of the land for the last twelve years; and for general equitable relief. The defendant denies the alleged ownership of the plaintiff, and his claim that he never parted with his interest in the land, and, by way of counter-claim, asks, in case he is found to be entitled to the shares he claims, that he be required to pay to her one-fifth of the amount expended by herself and her grantors for taxes and improvements. The defendant also avers that the alleged right of the plaintiff to rents and profits which accrued prior to the year 1888 is barred by the statute of limitations, and that his alleged right to an interest in the land is also barred, for the reason that she and the persons through whom she claims had been in continuous and actual possession of the land, under a claim of right and title to all of it adverse to the plaintiff, since the year 1881. The defendant also alleged that, prior to the death of Amos Van Ormer, the plaintiff, in consideration of the conveyance to him of the land in Pennsylvania, executed to his father a release of all right to or interest in real estate of which his father should die seized; that the interest of the plaintiff was extinguished by the tax deed; that the plaintiff knew of the conveyance to Feghtly, and that he took actual possession of the land in the year 1882; that for more than thirty years the plaintiff did not contribute anything to the payment of the taxes on the land, nor assert any interest therein, nor make any claim for rents prior to the commencement of this action; and that at all times he knew of and acquiesced in the conveyances and possession of the land. In reply, the plaintiff admits the issuing of the tax deed, and avers that it was obtained for the purpose of defrauding him, and

that it is void. The district court decreed the plaintiff to be the owner of the undivided one-fifth of the land, and that his share be partitioned and set off to him, and that he recover one-fifth of the rents and profits of the land for the period of ten years, including the year 1894, fixed at the sum of six hundred dollars, with interest thereon at the rate of six per cent. per annum, amounting to one hundred and ninety-eight dollars. The judgment for the amount stated was made a lien upon four-fifths of the land, as the share owned by the defendant. No allowance was made for taxes paid or improvements made.

I. The appellee has filed a motion to strike the evidence from the abstract, and to affirm the decree of the district court, on the ground that certain exhibits were removed from the transcript after it had been prepared. It appears that a transcript was made for the use of the district court, to which exhibits claimed to be valuable were attached, and that, after the district court had used the transcript, the exhibits were detached, and placed in a safe, to prevent loss. We are unable to determine from the evidence submitted to us whether the transcript had been made a part of the record when the exhibits were removed, but, if it had, the act of an attorney in removing them without authority from the court or adverse party would have been a most reprehensible mutilation of an official record. However that may have been, it is shown that the exhibits were inserted in their proper places in the transcript, after which it was duly certified, and, as submitted to us, it appears to be regular and sufficient. If it is not, steps to correct it should have been taken in the district court. The motion of the appellee must be overruled.

A motion of the appellant to strike an additional abstract filed by the appellee, in view of the disposition

we find it necessary to make of the case, is unimportant, and need not be considered.

II. The record contains much incompetent and immaterial evidence, to which objection was duly made, and which will not be given any weight in the consideration of the case. The competent and relevant evidence establishes facts substantially as follows: In the year 1862, Amos Van Ormer conveyed to the plaintiff eighty-five acres of land in Juniata county, in the state of Pennsylvania. When the father died, the next year, he still owned about four hundred acres of land in that county; and, soon after his death, proceedings were commenced in the orphans' court of Juniata county for a partition of the land. As a result of the proceedings, the land was divided and sold, and the proceeds were distributed among the heirs of the decedent, excepting the plaintiff. He knew of the proceedings, but did not participate in them, nor receive any part of the property distributed. The reason he gives for his non-participation is that some of his sisters thought he ought to be satisfied with what he had; that he was not well, and did not wish to quarrel with them, and therefore let them have the proceeds. There is some evidence to the effect that, when he received the conveyance for the eighty-five acres as stated, "he executed and delivered to his father a release of his share in any and all other real estate owned by his father;" but that is denied, and the testimony offered to prove the release is not satisfactory, and in some respects is improbable. Moreover, there is much in the record to contradict it. We are of the opinion that the sisters of the plaintiff demanded that the conveyance made to him be treated as an advancement equal to his share of the land in Juniata county, which his father owned at death, and that he acquiesced in their demands. He did not pay anything for the land, but he claims that he had

intended to move away from home, and that to induce him to remain, his father promised to give him the land for a home if he would erect a building upon it and otherwise improve it all of which he did. There is nothing in the record to show any judicial deter-

mination that the conveyance was an advancement. But the fact that no consideration was paid for the conveyance may be regarded a evidence that it was intended as an advancement, which is corroborated by the non-participation of the plaintiff in the distribution of the Juniata county land. If it be conceded that the conveyance should be treated as an advancement, it does not follow that the plaintiff should not recover in this action. The value of the estate left by Amos Van Ormer is not shown, nor does it appear whether advancements were made to any of the sisters. The value of the Juniata county land is not proven. If that conveyed to the plaintiff, and that which the decedent left to his heirs, were of the same value per acre, the plaintiff did not receive his share of the land in that county. It is not shown that he paid any taxes on the land in question, nor that he demanded any share of the rents derived from it prior to the commencement of this action; but it appears that he at all times claimed an interest in the land, and it is not shown that he ever released or conveyed that interest, and it is shown that the other members of the family regarded the land as belonging to all of the heirs.

III. The heirs of Amos Van Ormer became tenants in common of the land in question, and, when the conveyances described were made to Feghtly, he and the plaintiff became tenants in common. It is the general rule that the possession of a tenant in common is possession for his co-tenants, and that one cannot be disseised by another without an actual

ouster, or "a possession attended with such circumstances as to evince a claim of exclusive right and title, and a denial of the right of other tenants to participate in the profits." *Burns v. Byrne*, 45 Iowa, 287. It is said, however, that as the conveyances to Feghtly purported to convey all of the land to him, and as he took possession of the land under those conveyances, and improved it, and treated it as his own, there was such an ouster of the plaintiff that the statute of limitations then commence to run against

4 him. Had Feghtly claimed title, and held possession adversely to the plaintiff, it is probable that the statute would have commenced to run as claimed. *Kinney v. Slattery*, 51 Iowa, 353. But the evidence shows that he did not deny the title of the plaintiff, but at all times recognized the fact that he had an interest in it, and made frequent efforts to buy that interest, and the only evidence that the heirs of Amos Van Ormer, other than the plaintiff, ever claimed adversely to him, is the fact that their deeds purported to convey to Feghtly all of the land. But the evidence given by the only sister of the plaintiff who testifies shows that his interest in the land was always recognized by the heirs. The statute will not commence to run until there is an actual adverse possession, with the intent to claim against the true owner. *Jones v. Hockmen*, 12 Iowa, 108; *McNamee v. Moreland*, 26 Iowa, 107; *Grube v. Wells*, 34 Iowa, 148; *Skinner v. Crawford*, 54 Iowa, 120 (6 N. W. Rep. 144); *McCarty v. Rochel*, 85 Iowa, 432 (52 N. W. Rep. 361); *Litchfield v. Sewell*, 97 Iowa, 247 (66 N. W. Rep. 104). See, also, 1 Am. & Eng. Enc. Law (2d Ed.), 796. The preponderance of the evidence shows that the statute of limitations did not commence to run during the lifetime of Feghtly, and that it had not run at the commencement of this action. It is said that the plaintiff has slept upon his rights, and should not now

be permitted to enforce them. The answer to that is that, while he did not take any active steps to
5 enforce his rights, he did not waive them, and Feghtly and his grantors at all times knew of them, and had no reason to think they had been abandoned.

IV. It is well settled that a tenant in common cannot acquire title adverse to a co-tenant by purchase at a tax sale, or by the purchase of an outstanding incumbrance, which is permitted to ripen into a title. *Sorenson v. Davis*, 83 Iowa, 409 (49 N. W. Rep. 1004); *Austin v. Barrett*, 44 Iowa, 490; *Leach v. Hall*, 95 Iowa, 611 (64 N. W. Rep. 793); *Moy v. Moy*, 89
6 Iowa, 512 (56 N. W. Rep. 668). The sale of the land in question for delinquent taxes, and the issuing of the tax deed therefor, were in pursuance of a plan of Feghtly, and for his interest, to extinguish the title of the plaintiff. But it did not create any right adverse to him, and the defendant does not in argument claim anything to the contrary.

V. The appellant contends that the court erred in not allowing her for improvements made on the land, and for taxes paid, and that the allowance for rent was excessive. It is the general rule that a tenant in common cannot make his co-tenant liable for improvements made upon the land without the consent of the latter. 2 Jones, Real Prop., section
7 1893, *et seq.* But, where improvements have been made, they may be taken into consideration by a court of equity in making partition, that justice be done between the parties in interest. *Id.*; *Ford v. Knapp*, 102 N. Y. 135 (6 N. E. Rep. 283); *Carver v. Coffman*, 109 Ind. 547 (10 N. E. 567); *Freeman*, Co-ten., section 509. In this case, Feghtly, with knowledge of the interest of the plaintiff, made improvements of considerable value. That was done without any agreement or understanding with the plaintiff, and

without his consent, but it does not appear that he objected to what was done. The land was unimproved, unoccupied, and, so far as is shown, unproductive, before the improvements in question were made. They were of a character to increase the value of the land, and to make it desirable for renting purposes. Since

they were made, its rental value has been about
8 three hundred dollars per year. As the possession by Feghtly was not wrongful, and not against any known objection of the plaintiff, it would be inequitable to allow him to share in the rent which the improvements made possible, without requiring him to pay a share of their cost.

9 The general rule in regard to the liability of a tenant in common to a co-tenant for the rent of the property which is the subject of their co-tenancy, in the absence of any agreement, is that if one actually occupies the property, but his occupation is not adverse, and he does not exclude therefrom his co-tenant, he is not liable for rent, although his co-tenant does not share in the use of the premises. *Reynolds v. Wilmeth*, 45 Iowa, 693; *Varnum v. Leek*, 65 Iowa, 751 (23 N. W. Rep. 151); *Belknap v. Belknap*, 77 Iowa, 71 (41 N. W. Rep. 568); *Leach v. Hall*, 95 Iowa, 611 (64 N. W. Rep. 793); 2 Jones, Real Prop., section 1887, *et seq.* But when there is an ouster, and a tenant in common occupies and uses the property adversely to his co-tenant, or where he leases it to a third person, he is liable to his co-tenant for rent. *Sears v. Sellev*, 28 Iowa, 501; *Austin v. Barrett*, 44 Iowa, 488; *Dodge v. Davis*, 85 Iowa, 81 (52 N. W. Rep. 2); 2 Jones, Real Prop., section 1892.

We have seen that Feghtly did not hold the premises under a claim of right adverse to the plaintiff. It is true that he attempted an ouster by arranging to procure a tax title, but the tax deed was not and could not have been issued prior to his death, and

the tax sale cannot be given the effect of an ouster
Feghtly did not occupy the land personally, but
10 leased it to tenants, and therefore became liable
for the payment of a share of the rental
value of the land. It was stipulated on the trial that
the gross rents derived from the land for ten years had
averaged three hundred dollars per year. The cost of
collecting them was twenty-five dollars per year, leav-
ing a net sum of two hundred and seventy-five dollars
which the land produced each year. Of that the plain-
tiff was entitled to one-fifth, or to a total for the five
years during which the land was rented in the lifetime
of Feghtly of two hundred and twenty-five dollars.
His share of the cost of the improvements was about
one hundred and sixty dollars, and of the taxes paid
by Feghtly, or by the tax sale purchaser during
Feghtly's lifetime, thirty-five dollars and twenty-
three cents. It thus appears that the plaintiff's share
of the rent during Feghtly's lifetime exceeded by a
small sum the amount of his share of the taxes paid
and improvements made during that time. As the
defendant does not claim anything for improvements
made at any other time, the district court rightly
refused to allow her anything for improvements, or for
taxes paid before Feghtly's death. The defendant is
liable to the plaintiff for one-fifth of the rents she has
received, which was one-half of the rent for the time
she and Sarah Sigman were tenants in common, and
all of the rent since that time, and also for interest.
She is not liable for rents which may have been due to
the plaintiff from Feghtly or from Sarah Sigman.
She is entitled to deduct from the amount due from
her on account of rent one-fifth of the amount of taxes
she has paid on the land. The plaintiff is entitled to a
partition as ordered by the district court. We have
not overlooked the rule announced in *Austin v. Barrett*,
44 Iowa, 488, on which the plaintiff relies. But it

appears that in that case one Wilson owned as tenant in common an undivided one-tenth of the land there in controversy; that, instead of paying the taxes due, he permitted the land to go to tax sale, and became its purchaser, and then sold his interest to Barrett; that Barrett obtained a deed under the tax sale, and then claimed title to the entire tract of land adverse to his co-tenants; that, after he obtained the tax deed, his co-tenants offered to pay him for what he had paid out for taxes, and for all other expenses he had incurred on the land, and produced the money for that purpose, but he refused the tender, on the ground that he had a good title to the land. It was held, that his acts made him a disseisor of his co-tenants, and for that reason, and because of his attempt to destroy their title, he was not entitled to
11 contribution for improvements made. But we have seen that Feghtly was not a disseisor. He did not obtain a tax deed, and the only interest the defendant is shown to have had in the one issued subsequently to his death is that, after this action was commenced, she received a conveyance of the land from the grantee of the person to whom the tax deed was issued. The conveyance thus obtained did not transfer any interest in the land, nor did it embarrass the plaintiff, and the only evidence that the defendant claimed adversely to the plaintiff, is her answer in this case. We do not think the tax deed should have any effect in the determination of this case. The decree of the district court will be modified to conform to the conclusions we have announced, and the cause will be remanded to that court, to ascertain the amount due to the plaintiff, under the rules we have stated, for a final adjustment of the rights of the parties, and for a decree in harmony with this opinion.—
MODIFIED AND AFFIRMED.

102	162
124	117

**LATIMER & INGLIS V. THE CITIZENS STATE BANK, D. W.
MOTT, K. S. COLE, and E. S. PATTERSON,
Appellants.**

Conflict of Laws: STOCKHOLDER'S LIABILITY. The individual liability
1 of stockholders under Compiled Laws of South Dakota, section
2 2933, providing that every stockholder shall be liable to a joint
or several action for the corporation's debts to the amount unpaid
on his stock, may be enforced in another state, since the Dakota
statute neither provides a special remedy nor creates an exclusive
statutory liability.

Corporations: LIABILITY AS STOCKHOLDERS. A bank authorized by
4 its charter to "discount bills, notes, and other securities," has
power to purchase shares of stock of a corporation in payment of
a debt for which such stock was originally given as collateral
security, and is liable thereon the same as any other owner of
stock.

Stockholder's Liability: JUDGMENT AGAINST CORPORATION: *Præ-*
8 *litæ.* The rendition of a judgment against a corporation is not a
necessary prerequisite to the maintainance of an action to enforce
the statutory liability of the stockholders for the corporate debt,
where the corporation is notoriously insolvent, its assets have
been seized under legal process, and it has ceased to do business.

Assignment of Errors. An assignment of error in overruling objec-
5 tions to "each of the following questions and answers," followed
by a page of printed questions and answers without objection, is
not sufficiently specific to permit a review, the argument not stat-
ing the grounds of the objections.

Appeal from Franklin District Court.—HON. S. M.
WEAVER, Judge.

FRIDAY, MAY 14, 1897.

PLAINTIFFS, creditors of the Brule County Bank,
of Chamberlain, S. D., bring this action at law to
charge the defendants, respectively, with a balance
unpaid on stock of said Brule County Bank owned by

each of them. The case was tried to the court, and a judgment rendered in favor of the plaintiffs. Defendants appeal.—*Affirmed.*

Taylor & Evans for appellants.

J. W. Luke and *E. P. Andrews* for appellees.

GIVEN, J.—I. There is but little dispute as to the facts of this case, and those necessary to be noticed are as follows: The Brule County Bank, a corporation organized under the laws of South Dakota, and doing business in Chamberlain, in that state, drew its draft in favor of the plaintiffs for one thousand, seven hundred eighty-eight dollars and forty-eight cents on the Union Stock Yards State Bank, of Sioux City, Iowa. On presentation of said draft to the bank in Sioux City, payment was refused, of which fact the Brule County Bank was duly notified. Payment was demanded of the Brule County Bank, which it failed to make, being at that time insolvent. The defendants, all residents of Franklin county, Iowa, were at, before, and since said transaction each owners of shares of the capital stock of said Brule County Bank of the par value of one hundred dollars per share, as follows: The Citizens State Bank owned fifty shares, D. W. Mott twenty-five shares, K. S. Cole ten shares, and E. S. Patterson two shares. But fifty per cent. of the face value of these shares of stock has been paid. The statute of South Dakota under which the Brule County Bank was
organized and doing business provides as follows:
1 "Each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him. Any creditor of the corporation may institute joint or several actions

against any of its stockholders that have not wholly paid the capital stock held by him, and in such action the court must ascertain the amount that is unpaid upon the stock held by each stockholder and for which he is liable, and several judgments must be rendered against each in conformity therewith. The liability of each stockholder is determined by the amount unpaid upon the stock or shares owned by him at the time such action is commenced, and such liability is not released by any subsequent transfer of stock. And in no other case shall the stockholders be individually and personally liable for the debts of the corporation. The term 'stockholder,' as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another; and also to every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian or other trustee who voluntarily invests any trust funds in the stock." Compiled, Laws, section 2933. It is under these facts and this statute that the plaintiff seeks to charge the defendants, respectively, with the balance unpaid on their shares of stock to the amount of the indebtedness due to the plaintiffs from the Brule County Bank.

II. The questions of law presented on this appeal were raised by a demurrer to the petition, which was overruled, and substantially the same question with others, was raised by the answer. We will proceed to

2 consider such of these questions as are discussed in the arguments before us. Appellant's first contention is that said statute of South Dakota "provides the certain remedy to be pursued for the enforcement of the liability thereby created, and such remedy is exclusive. and can be pursued

only in the state of South Dakota." Appellants cite a number of cases in support of this contention, relying more particularly upon the following: *Bank v. Rindge* (Mass.) 27 N. E. Rep. 1015; *Fowler v. Lamson* (Ill. Sup.) 34 N. E. Rep. 932; *May v. Black* (Wis.) 45 N. W. Rep. 949; *Bank v. Francklyn*, 120 U. S. 747 (7 Sup. Ct. Rep. 757); *Young v. Farwell* (Ill. Sup.) 28 N. E. Rep. 845; *Marshall v. Sherman* (N. Y. App.) 42 N. E. Rep. 419. We will not here consider these cases separately. It is sufficient to say that, as applied to this question, they may be summed up as holding as follows: That the courts of a state will not enforce a statutory liability created by the statute of another state when a special remedy is provided for its enforcement. The cases of *Bank v. Rindge*, *Fowler v. Lamson*, and *Marshall v. Sherman* were based upon the constitution and statutes of Kansas, providing an "individual liability of stockholders to an additional amount equal to the stock owned by such stockholder," and a special remedy against the stockholders and as between the stockholders. *May v. Black* was under a statute of Michigan creating "personal liability for all claims for labor performed," and provided as a remedy a joint action in assumpsit against the corporation and any or all stockholders, and "that such action shall be brought in the county where the mine is located." (Howard, Ann. St., sections 4110, 4112). *Young v. Farwell* was against stockholders in a Michigan mining corporation subject to the same statute. *Bank v. Francklyn* is not in point, as it simply holds that where a special remedy is provided, the liability can only be enforced in that manner in the courts of the United States. Turning to the statute of South Dakota, it will be seen that the liability therein referred to is quite different from that created by the statutes we have mentioned. It is "for the debts of the corporation to the extent of the amount that is unpaid upon

the stock held by him," while in the other statutes a liability that would not otherwise exist, is created. The liability for unpaid stock is not created by statute, but is one that already existed. "The public has a right also to assume that the capital stock has been, or will be fully paid up, if it be necessary, in order to meet corporate liabilities. Accordingly, the American courts go very far to protect corporate creditors." Cook, Stock, Stockh. & Corp. Law, section 199. The same author says: "Accordingly, statutes are passed expressly declaring that the stockholders shall be so liable for a specified sum, in addition to their unpaid subscriptions. This is called the 'statutory liability' of stockholders." Cook, Stock, Stockh. & Corp. Law, sections 212, 213. The liability under consideration being for unpaid stock, it is not exclusively a statutory liability, but one that could be enforced, in the absence of statute, by a creditor's bill. The statute of South Dakota does not provide a special remedy for enforcing this liability, but leaves the creditor the same form of action that he could have brought if there was no statute. The provisions as to who shall be deemed stockholders, that the action may be joint or several, and the extent of the stockholder's liability, do not provide the remedy, but fix limits by which the remedy shall be administered. The liability of these stockholders arises out of their contractual relation to the corporation and to its creditors, and we see no reason in the nature of that liability, nor in the provisions of the statute of South Dakota, why the liability may not be enforced in a court of Iowa against persons of whom it has jurisdiction.

III. Appellant's next claim is that to maintain this action appellees must first obtain a judgment against the Brule County Bank, determining the amount due to them from that bank. In some of the statutes

prescribing the liability of stockholders it is so provided; also that the property of the corporation shall be first exhausted; but not so in the statute under consideration. The right of the creditors to pursue the stockholders for unpaid stock, even, is not made to depend upon the insolvency of the corporation. Under section 1088 of our own Code, execution against the company may be levied upon the private property of an individual stockholder to the extent of the unpaid installment on stock owned by him, when no property can be found of the corporation. Where, as in this case, the corporation is insolvent, and all its assets held under attachments, it would be idle to require that plaintiffs first obtain judgment and execution against it. Appellants were entitled to and could have made any defense to the claim of appellees against the Brule County Bank that the bank could have made, and as stockholders they could have known of any defenses that existed. Cook, Stock, Stockh. & Corp. Law, section 200, after stating the general rule that judgment and execution must first be had against the corporation, says: "Where, however, the corporation has been adjudged a bankrupt, and a dissolution has in this way been brought about, the remedy against the corporation, need not be first exhausted. Such, also, has been held to be the rule where the corporation is notoriously insolvent, or is formally dissolved." Under the undisputed evidence in this case that the Brule County Bank was notoriously insolvent, that its assets had been seized under legal process, and that it had ceased to do business, we do not think that plaintiffs should be required to exhaust their remedy against it before pursuing their remedy against the stockholders. It is said in this connection that prior to the commencement of this action the Brule County Bank had made a general assignment for the benefit of its creditors. It further

appears that on the objection of the attaching creditors the assignee was discharged, and a receiver appointed, and that, attachments covering all the assets being sustained, the receiver was discharged. These facts confirm us in the conclusion that plaintiffs should not be required to first pursue the corporation.

IV. It is urged on behalf of the defendant Citizens State Bank that it had no power to assume this liability, and that, if it had, it is void for want of consideration. By its incorporation it had "power
4 to discount bills, notes, and other securities."

It received certain shares of the Brule County Bank stock as collateral from one Clark, and afterwards bought them, giving him credit for one thousand five hundred dollars therefor on his debt, and agreeing to give him further credit in such sum as might be realized therefrom over one thousand five hundred dollars. This defendant had new certificates made direct to it, and transfers entered on the stock register of the Brule County Bank. This defendant not only did have the power to buy, but actually did buy and own, this stock, and it is therefore liable the same as any other owner of stock.

Appellants' counsel in argument "call particular attention to certain evidence" of witnesses Latimer and Conerick, and say that it "was clearly subject to
the objections made, and ought not to have been

5 admitted." Counsel do not otherwise point out

in argument the particular parts of the evidence objected to, nor the grounds of objection relied upon.

The fifth assignment of error is "in overruling the objections to each of the following questions and answers in the testimony of plaintiff's witness Conerick." Following this is about a page of closely-printed questions and answers, which appear to be without objections. Without a more specific assignment of errors, we cannot know what rulings are complained

of, nor the grounds of the complaint. After a most careful examination of this case, we reach the conclusion that the judgment of the district court should be **AFFIRMED**.

CAROLINE DOEHREL V. HEINRICH HILLMER, HEINRICH PRELLBURG, AUGUST PRELLBURG, CHRISTIAN PRELLBURG, Appellees, and LOUISA SINDLINGER, HEINRICH F. HILLMER, CHRISTIAN F. HILLMER, JOHAN R. HILLMER, HERMAN F. HILLMER, AUGUST M. HILLMER, and WILHELM F. HILLMER, Appellants.

102	169
144	490
144	491

Conflict of Laws: TREATY AND STATUTE: *Estates of decedents*. A
1 treaty providing that aliens may inherit lands is controlling, though in conflict with laws of the state.

CONSTRUCTION OF TREATY. Under a treaty which provides, that a
8 citizen or subject of one country to whom land in the other country would descend, were it not for his alienage—a non-resident alien may inherit land in Iowa, from a citizen of Iowa, and if he die before his children they will take what would have descended to the father, though the children, too, are non-resident aliens.

"PURCHASE" DEFINED: *Construction of statute.* An alien taking land
2 in Iowa under a will takes the property by purchase, within Acts Twenty-second General Assembly, chapter 85, providing that a non-resident alien may acquire property, to a certain extent, if, within five years from the date of *purchase*, the same is placed in the actual possession of a relative of such purchaser.

Appeal from Black Hawk District Court.—HON. A. S. BLAIR, Judge.

FRIDAY, MAY 14, 1897.

HANNAH HALBFASS, a citizen of Iowa, died seized of certain lots in La Porte City, and one hundred and twenty acres of land near there. In her will she devised such property to Caroline Doehrel, of Erie, Pa., and Heinrich Hillmer and Wilhelmina

Prellburg, of Hanover, Germany, share and share alike. She died February 3, 1892, and her will was admitted to probate March 15 of the same year, and afterwards the title of each devisee to an undivided one-third of the property was confirmed by a decree of the court in an action to quiet title. Wilhelmina Prellburg was a widow, and died December 11, 1893, leaving, her surviving, three sons, Heinrich, August, and Christian Prellburg, who are also residents of Hanover. Her will, admitted to probate in Germany, was not executed as required by the laws of this state, and no claim is made thereunder. She also left the following next of kin, residents and citizens of the United States: The plaintiff and Louisa Sindlinger, sisters of deceased, and the other appellants, who are sons of a deceased brother. This is an action for partition, and the only question involved is whether the undivided one-third of the property which belonged to Wilhelmina Prellburg descends to her sons in Germany, or to her next of kin in this country. Decree was entered declaring the sons entitled to the property. The next of kin, except plaintiff, appeal.—*Affirmed.*

Mullan & Pickett for appellants.

Alford & Gates for appellees.

LADD, J.—Under the will of Hannah Halbfass, Wilhelmina Prellburg took an undivided one-third interest in the real estate in controversy. She was a resident of Hanover, Germany, and a subject of the king of Prussia, at the time of her death, and left, her surviving, three sons, August, Heinrich, and Christian Prellburg, who are also residents of the same place, and subjects of the king. They claim to have taken this property from their mother by descent. Under

the laws of this state non-resident aliens cannot so acquire land. *Furenes v. Mickelson*, 86 Iowa, 508 (53 N. W. Rep. 416); *Burrow v. Burrow*, 98 Iowa, 1 400 (67 N. W. Rep. 287). They rely, however, upon a treaty concluded between the United States and the king of Prussia May 1, 1828, and ratified and proclaimed March 14, 1829. A part of article 14, only, need be quoted: "And where, on the death of any person holding real estate within the territory of the one party, such real estate would, by the law of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the government of the respective states." The provisions of this treaty are controlling, even though in conflict with the laws of this state. *Opel v. Shoup*, 100 Iowa, 407 (69 N. W. Rep. 560); *Wilcke v. Wilcke*, 102 Iowa, 173 (71 N. W. Rep. 201).

The mother took the property by purchase, within the meaning of chapter 85 of the Acts of the Twenty-second General Assembly. *Bennett v. Hibbert*, 88 Iowa, 154 (55 N. W. Rep. 93). Section 2 of 2 that chapter is: "Any non-resident alien may acquire and hold real property to the extent of three hundred and twenty (320) acres, or city property to the amount of \$10,000 in value, providing that within five years from the date of purchase of said property, the same is placed in the actual possession of a relative of such purchaser, the occupant being related to such owner within the third degree of kindred, or the husband or wife of such relative, and further provided that such occupant become a naturalized citizen within ten years from the purchase of such property as aforesaid." Wilhelmina Prellburg, then, took the property with the conditions and

limitations imposed by the statute. The treaty allows a reasonable time to dispose of the land, and that fixed by this section is ample for that purpose. Her estate in the land was that defined by Plowden as a fee simple determinable, or by Blackstone, as a base or qualified fee. A fee determinable will descend in the line of succession of the purchaser, and will determine upon the happening of the event upon which it was first limited, into whosoever it may come. 1 Washburn, Real Prop., 90. See also, *Chirac v. Chirac*, 2 Wheat. 259. This precise question is determined in *Schultze v. Schultze* (Ill. Sup.) 36 Am. St. 432 (33 N. E. Rep. 201), where it is said: "By the terms of the treaty, the power to dispose of the land and appropriate its proceeds, is granted in positive terms. Such a power to sell cannot be exercised unless the donee is vested with the fee, or, in other words, the complete ownership." *Kull v. Kull*, 37 Hun. 476. Clearly, Wilhelmina was owner of real property, within the meaning of the treaty.

But the appellants contend that the treaty is intended to apply only to persons residing in this country, so far as land in this country is concerned; further, that the treaty contemplates but one
3 step of transmission. It is held in the case of *Hauenstein v. Lynham*, 100 U. S. 483, that "where a treaty admits of two constructions, one restrictive of the rights that may be claimed under it, and the other liberal, the latter is to be preferred." The wording of the article quoted from the treaty seems to preclude the construction contended for. The evident purpose was to so protect the citizens and subjects of both countries in their property interests that alienage would not affect the right of inheritance. The citizenship or residence of the person upon the death of whom real estate descends is not mentioned. The property, and not from whence it comes, is the

important consideration. "And where upon the death of any person holding real estate within the territories of one party" can only be given one intelligent construction,—that of the plain import of the language employed. By the terms of the treaty considered in *Schultze v. Schultze*, *supra*, relied upon by appellants, inheritance is expressly limited to the heirs and devisees of one country from subjects or citizens of the other. In *Opel v. Shoup*, *supra*, this court considered a treaty between the United States and the king of Bavaria, a part of the second article of which is identical with that involved in this case; and it was there held that real property inherited by a subject of the king of Bavaria from her daughter, a citizen of this country, descended to her (the mother's) heirs, who were also subjects of the king. Clearly, under the terms of the treaty with the king of Prussia, alienage does not affect the right of inheritance, when the heir or devisee is a citizen or subject of the country of the decedent, and this is not limited to one step in transmission. The district court rightly held the sons entitled to the property, and its decree must be **AFFIRMED.**

LUDWIG WILCKE V. ISABELLA WILCKE, Appellant, and
Heirs at Law of FREDRICH WILCKE, *et al.*,
Appellees.

Descent and Distribution: **ALIENAGE:** *Mediate and immediate inheritance.* Under Code, section 2457, providing that if both parents of an intestate be dead, the portion of the estate which would have fallen to them shall be disposed of as if they had outlived intestate, and died in possession of their portion, where a son dies after the death of his parents, who would have otherwise inherited, the inheritance which passes to his brother is direct, and does not depend on the fact whether the parents, at the time of their decease, being aliens, were capacitated to take under the provisions of the law.

102	173
102	171
102	173
121	428
123	86
123	749

102	173
137	262

TREATY RIGHTS: *Evidence.* Under the treaty between the king of
4 Prussia and the prince of Waldeck, and other evidence adduced
the citizens of Waldeck became subjects of the king of Prussia,
so as to be affected by the terms of a treaty between the United
States and Prussia governing the rights of inheritance of citizens
of the respective countries.

CHILDLESS WIDOW'S SHARE. A widow if entitled to one-half the estate
5 of her husband takes the added one-sixth in addition to the third
given by Code, section 2440, as heir and not as part of her distribu-
tive share, and takes subject to the same rules as property taken
by other heirs, including payment of incumbrances.

Partition: **JOINDER AND COUNTER-CLAIM:** *Practice.* Where, in par-
tition of land, defendant claims a lien on the property because of
1 the payment of a mortgage thereon, plaintiff can ask to have a
claim for rent growing out of the occupancy of the land by such
defendant adjusted, though Code, section 3277, provides that there
shall be no joinder or counter-claim of any other kind, in partition.

Appeal from Clinton District Court.—HON. P. B.
WOLFE, Judge.

FRIDAY, MAY 14, 1897.

ADAM WILKE died intestate in 1891 in Clinton county, Iowa, seized of eighty acres of land, which he acquired in 1877, while a non-resident alien. He became a citizen of the United States in 1882. He left surviving him, as his widow, the defendant Isabella Wilcke, but no issue. The parents of Adam Wilcke died in Germany prior to his death, and it seems to be conceded that they were incapacitated to inherit real estate by the law of this state. Adam Wilcke also left surviving him the plaintiff, Ludwig Wilcke, a brother of the full blood, Christian Wilcke, a brother of the half blood, and the heirs of certain other brothers of the half blood, whom it is unnecessary to name. The plaintiff and all the other survivors, except the widow, were, at the death of Adam Wilcke, aliens, and residents of Waldeck, Germany. Christian Wilcke and the heirs of the other brothers of the half blood are made parties defendant to this

suit. The action is for the partition of the eighty acres of land left by Adam Wilcke. The plaintiff represents in his petition that the widow is entitled to an undivided one-half of the land; that he, as brother of the full blood, is entitled to an undivided five-sixteenths; that Christian Wilcke, a surviving brother of the half blood, is entitled to an undivided one-sixteenth; and the heirs of deceased brothers of the half blood to proportionate shares. By an amendment to the petition, the plaintiff pleaded a treaty between the United States and the king of Prussia, because of which it is claimed that the non-resident alienage of the parties does not defeat their right of inheritance. The petition asks a confirmation of the shares in accordance with the averments, and for partition accordingly. The widow alone answers. She pleads the facts as to the non-resident alienage and the decease of the parents of Adam Wilcke, and that the other defendants and the plaintiff "would become entitled to inherit, if at all, only by tracing their rights of inheritance through the said father and mother of said Adam Wilcke." She further pleaded facts to show that the land in question was incumbered by mortgage at the death of Adam Wilcke, which, under the belief that she owned all of the land, she had paid off, and asked, if any part should be found to belong to the other claimants, that the amount she had so paid should be paid therefrom. In reply, the plaintiff pleaded that, since the death of Adam Wilcke, the widow has occupied and received the rents of the premises entire, and asked that the value thereof be deducted from the amount due because of the discharge of the mortgage lien on the land. The district court found as facts that the plaintiff and the defendants, except Isabella Wilcke, were subjects of Prussia, and of the king of Prussia, at the time of the death of Adam Wilcke, and the plaintiff

has, since the death of Adam Wilcke, removed to, and is now residing in Iowa, and that partition of the land could not be equitably made. It confirmed the shares as alleged and asked by plaintiff; allowed the widow's claim for disbursements to discharge the mortgage lien from the land, after deducting the amount of the rents of the land therefrom; and ordered a sale of the land, and a distribution of the proceeds in accordance with the judgment as to shares. The defendant Isabella Wilcke appealed.—*Affirmed*.

Eldred S. James for appellant.

S. C. Scott for appellee.

GRANGER, J.—I. As has been stated, plaintiff, in his reply, recited the facts as to the occupancy of the land by appellant, and asked that the rents received therefrom be deducted from the claim for disbursements on account of the mortgage lien discharged by her. Appellant moved the court to strike that part of the reply. The motion was denied, and complaint is made of the ruling. The claim is that it is an independent action in the nature of an accounting, or for money claimed. It is said, if it was to come into the action, it should have been pleaded in the petition. That could not have been done, because of Code, section 3277, which provides that there shall be no joinder or counter-claim of any other kind in an action for partition. Appellant concedes that she pleaded a counter-claim, in asking to recover for the disbursements to discharge the mortgage; and, but for that, we should hold that the claim for rent was improperly pleaded in a reply. It may be doubted if the counter-claim by appellant is within the exceptions of the chapter regulating the procedure for partition of real estate. But that we do not decide.

for no such question is raised. It was, however, an independent right of recovery, but pleaded in this proceeding to secure a lien for its payment. It grew out of her occupancy and treatment of the land as her own. The claim for rent grew out of the same occupancy and treatment of the land by her, and the attempt seems to have been to adjust the debit and credit claims of the occupancy so as to leave the shares of the land, if partitioned, or the proceeds of it, if sold, freed from liens. Ordinarily, such a plea would not be one in avoidance of the counter-claim pleaded by appellant, but as her claim is sought to be made a lien on the subject-matter of the suit, and the plea in the reply is to avoid such a lien, in whole or in part, we think the court did not, in view of the situation, err in denying the motion.

II. Appellant states her second proposition for consideration as follows: "The appellees must trace their right of inheritance through the father and mother of the deceased, and, both having died
2 aliens, the right of inheritance is cut off." As we gather appellant's thought, it is that the inheritance of brother from brother is not immediate or direct, but mediate or indirect, as through another. Applied to this case, the thought is that plaintiff's right to inherit from his brother Adam depends on whether one or both of their parents could have so inherited at the time of death. If yes, that right is transmitted to the plaintiff. If no, it is lost. The conclusion must be reached in the light of the following provisions of the Code:

Section 2455. "If the intestate leave no issue, the one-half of his estate shall go to his parents and the other half to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents."

Section 2456. "If one of his parents be dead, the portion which would have gone to such deceased parent

shall go to the surviving parent, including the portion which would have belonged to the intestate's wife, had she been living."

Section 2457. "If both parents be dead, the portion which would have fallen to their share by the above rules, shall be disposed of in the same manner as if they had outlived the intestate and died in the possession and ownership of the portion thus falling to their share, and so on through ascending ancestors and their issue."

It is not easy to deduce appellant's thought from the language of section 2457. The sections quoted plainly provide that, if the parents are alive, the property goes directly to them, because of their preference as heirs. If dead, it does not go to their estate for inheritance from them, but the heirs of the parents are made the heirs of the intestate, and the manner of disposition is made the same as if the parents had inherited, and the heirs had taken from them. The fact of the death of the parents being proved, the principal, if not the only object of section 2457 is, to identify the heirs of the intestate, and determine their proportions. In *Lash v. Lash*, 57 Iowa, 88 (10 N. W. Rep. 302), speaking to a state of facts to make the language entirely applicable to the question we are considering, this court, through Adams, C. J., said: "The estate in question never constituted any part of Christian Lash's estate, and was therefore never affected by Christian Lash's will. As the estate in question never constituted any part of Christian Lash's estate, no part thereof ever passed from Christian Lash to Anna Lash by inheritance, distribution, or otherwise. Whatever the plaintiff or any other heir of the intestate takes, he takes directly from the intestate, and not otherwise. Nothing, in fact, intervenes between the death of the intestate and the transmission of his estate to his heirs.

The survivorship of the parents is a fiction. We suppose it to determine the descent. For that purpose we need suppose it as continuing only for an instant. Both parents are to be supposed as then dying in the ownership of the property which would have gone to them respectively. Neither is to be supposed as taking from the other, because in fact neither has anything which the other can take. It is immaterial which of the parents died first, or whether the one which died first died testate or intestate." There is much significance in these words: "Nothing in fact intervenes between the death of the intestate and the transmission of his estate to his heirs. The survivorship of the parents is a fiction. We suppose it to determine the descent." We do not think it important to

elaborate the thought. We think that where
3 property passes from brother to brother, under the law we are considering, the inheritance is direct, and does not depend on the fact of parents, at the time of their decease, being capacitated to take under the provisions of our law. There is nothing in *McGuire v. Brown*, 41 Iowa, 656; *Neeley v. Wise*, 44 Iowa, 544; or *Moore v. Weaver*, 53 Iowa, 11 (3 N. W. Rep. 741), not in accord with this conclusion. The rule as to the descent of property under similar conditions has been much considered by the courts, and the judges of particular courts in this country and in England have been somewhat divided as to the precise facts under which a descent of property shall be said to be mediate or immediate. In this state, in *Furenes v. Mickelson*, 86 Iowa, 508 (53 N. W. Rep. 416), an inheritance from a great uncle, through a father, is said to be mediate. So far as we have seen, such a rule is universal. Just what degree of consanguinity will mark the distinction between mediate and immediate inheritance does not seem to be definitely defined. It has been said that "in tracing the line of

inheritance between brothers, or their descendants, it is not necessary to name the father as the common ancestor, and that alienism in any ancestor whom it is not necessary to name in tracing such inheritance or descent does not have the effect to impede it." In *Beavan v. Went* (Ill. Sup.) 41 N. E. Rep. 91, the question of inheritance, and how it is affected by non-resident alienage, has received quite extended discussion, and we quote from that case as follows: "Descents have long been distinguished as mediate and immediate; but as shown by Mr. Justice Story in *Levy's Lessee v. McCartee*, 6 Pet. 102, these terms are susceptible of different interpretations, whence some confusion has been introduced into their legal discussion, since different judges have used them in different senses. But as said by Lord Hale, as quoted in *Collingwood v. Pace*, 1 Vent. 413: 'In immediate descent there can be no impediment but what ariseth in the parties themselves; but in mediate descents, it is agreed, the disability of being an alien or attainted, in him that is the medius antecessor, will disable the other, though he have no disability.' In *Collingwood v. Pace*, which was argued before all the judges of England, the question was whether the inheritance by a brother from his brother, the father being an alien, was mediate or immediate; and it was decided, after much discussion, by seven judges against three, that the inheritance was immediate, so as not to be affected by the alienage of the father. It was held that in tracing the line of inheritance between brothers, or their descendants, it was not necessary to name the father as their common ancestor, and that alienism in an ancestor whom it was not necessary to name in tracing such inheritance or descent does not have the effect to impede it. In *McGregor v. Comstock*, 3 N. Y. 408, the same rule was applied to an inheritance between first cousins, their fathers being citizens, but

whose grandfather was an alien. Thus, in *Jackson v. Green*, 7 Wend. 333, the intestate was a naturalized citizen, and the claimants were the heirs at law of a cousin of the intestate, who was also a naturalized citizen. It was claimed that the descent between cousins was immediate, notwithstanding the circuitry of the line of sanguinity, and that the alienage of their intervening relatives was no bar to the inheritance; but this claim was disallowed, it being held that, while the descent from brother to brother was considered immediate, that from cousin to cousin was not." In that case, the relationship between the claimant and the testator was quite remote, and the rule of mediate descent was applied, and the right of inheritance denied, by a divided court. In this case the rule need have no broader application than as between brother and brother, for the appellees are not in dispute, and such a rule concludes the appellant.

III. A more difficult question is whether the treaty pleaded as existing between the United States and Prussia takes the claimants, against the widow, out of the provisions of our law prohibiting non-resident aliens from acquiring property in this state by descent. No question is made as to the prohibition in this case, unless such claimants are relieved from the operation of the law by the terms of the treaty pleaded. Nor is there any question but that, if the plaintiff and the other appellees were subjects of the king of Prussia at the decease of Adam Wilcke, the treaty operates

to relieve them from the prohibitions of the
4 law. We are to determine, as a question of fact, whether the province of Waldeck is so far a part of the kingdom of Prussia that citizens of Waldeck are subjects of the king of Prussia, within the meaning of the treaty between the United States and Prussia. As the record is presented, we are to determine this question in the light of history, as it may be

aided by particular evidence introduced. The basis for the claim that its citizens are such subjects is a treaty between Prussia and Waldeck relative to the transfer of the administration of Waldeck to Prussia. The articles of treaty appear in the record, and they appear as made by "his majesty, the king of Prussia, and his serene highness, the prince of Waldeck"; and it is expressed that the parties are "animated by the wish of facilitating the entry of the principalities of Waldeck and Pymont into the North German Confederation." The articles are some twelve in number, from which it appears that Prussia undertakes the internal administration of the principality of Waldeck, exclusively, except in certain particulars, which seem to be mainly of ecclesiastical and charitable importance. While the administration is to be in the name of the prince, a governor is appointed by the king, and placed at the head of the administration of the principality, and undertakes "the constitutional responsibility of the government of the country." Prussia is empowered to organize the judicial and administrative authorities differently, according to her judgment. Prussia is to receive the whole of the services of the principality, and defray all expenses, except some pertaining to ecclesiastical authority. All the state servants are appointed by Prussia, are Prussian subjects, and take the oath of allegiance to the king. The representation of the country abroad is retained by the prince, but it is exercised under the responsibility of the governor, who is appointed by the king. It is to be said that the authority reserved to the prince is of slight importance, and practically divorced from the temporal concerns of government. The articles speak of Waldeck both as a principality and a state. The testimony as to the application of the treaty to governmental affairs shows, as to its temporal concerns

generally, that the province is as much a part of the Prussian kingdom as any province could be with any slight reservation of governmental authority. It has a slight representation in the federal council and imperial diet, or at least it did have. It is historically said, that its military affairs are all in the hands of the Prussian government, and education, the administration of justice, and similar matters, are all conducted on the Prussian model. If a subject is one who is governed by the laws of a sovereign or country, and owes allegiance thereto, it is difficult to escape the conclusion that the citizens of Waldeck are subjects of the king of Prussia. Prussian authority is almost, if not quite, absolute, as to its military, judicial, and administrative affairs. Little, if anything, of importance is left, except its religious concerns. These, we think, are the controlling facts in the case; and our conclusion is, that because of the treaty between this and the Prussian government, the appellees inherit from Adam Wilcke.

IV. The district court, in fixing the shares, first gave to appellant one-third of the land. It then ordered that, from the remaining two-thirds, the disbursements by appellant should be paid, and of the balance it gave to appellant one-fourth thereof, and the remainder to the appellees, as before stated. The effect of the order was to make the one-sixth necessary to make the difference between the one-third and one-half going to appellant bear its proportion of the incumbrance, leaving to appellant one-third in
5 no way affected by the incumbrance. She now urges that no part of her half should have been subjected to that burden. It is said the court was governed by the rule of *Smith v. Zuckmeyer*, 53 Iowa, 14 (3 N. W. Rep. 782), and other cases. In the *Smith-Zuckmeyer Case* it is held that the distributive share of the widow, which is given her by Code, section

2440, and which includes the dwelling house given by law to the homestead by section 2441, consists of the one-third in value of the real estate, and that, if she is entitled to one-half, the added one-sixth, to make the one-half, she takes as heir, and not as a part of the distributive share to the widow. The case places the one-sixth taken as heir outside the operation of the law by which the distributive share is protected in certain particulars, and it is subject to the same rules as property taken by other heirs. We think appellant has no ground of complaint because of the action of the court. The judgment of the district court will stand **AFFIRMED**.

IRA A. BRUCE AND CLINTON S. FLETCHER, Appellants,
v. ELBRIDGE D. PATTERSON, MARY M. PATTERSON,
THE LEWIS INVESTMENT COMPANY, and THE
BANKERS' LIFE ASSOCIATION.

Evidence: LEGITIMACY. A finding that a specified person is illegitimate is sustained by evidence that his mother's husband was absent from the state for nearly two years until about three months before his birth, during which absence the mother was living in open adulterous relations with another person and had a bad reputation for chastity.

Same. If a delay of eight years in asserting claim to the land of a decedent, knowing that others are dealing with the land as their own, and that his heirship is questioned, is not sufficient to establish that the claimant is illegitimate, it is, at least, entitled to weight in determining whether he is legitimate.

Appeal from Cass District Court.—HON. N. W. MACY,
Judge.

FRIDAY, MAY 14, 1897.

SUIT in equity to partition certain real estate theretofore owned by Harrison Bruce, deceased. The plaintiffs each claim to own an undivided one-sixth

of a part of the property, and an undivided third of the remainder, by inheritance from the said Harrison Bruce. Defendants deny the plaintiff's title, plead title in themselves, the statute of limitations, laches, and certain other defenses, which it will not be necessary to notice. The lower court dismissed the plaintiff's petition, and they appeal.—*Affirmed.*

Willard & Willard for appellants.

Curtis & Follett and *Lewis & Royal* for appellees.

DEEMER, J.—Harrison Bruce died seized of the property in dispute on the twenty-seventh day of April, 1882. He left surviving him his widow, Mary Bruce; Samuel Bruce, a son by a former marriage; and, as appellants claim, Ira A. Bruce, the issue of that second marriage. Shortly after the death of Bruce, Samuel quitclaimed all his interest in the real estate to Mary Bruce, and on May 6, 1886, Mary Bruce conveyed the land by warranty deed to one Mary Shirrey. Shirrey held the title until the year 1888, when she in turn conveyed the same to Elbridge D. Patterson, who has ever since used and occupied the property. Patterson and wife mortgaged the premises to the Lewis Investment Company. This company assigned the said mortgage to the Bankers Life Association. In 1894, Ira A. Bruce, one of the plaintiffs, sold and conveyed to his co-plaintiff an undivided one-half interest in and to the estate of Harrison Bruce; and on the nineteenth day of January of that year, appellants commenced their suit for partition, claiming that Ira A. Bruce was and is an heir of the said Harrison Bruce, and as such is entitled to a share of his estate. The defendants deny the heirship of Ira A. Bruce, plead the statute of limitations, and an estoppel. That Ira A. Bruce is a son of Mary Bruce is conceded, but his

legitimacy is denied by the appellees. The rule of law in such matter is well understood, and, except in its application, is not the subject of controversy between the parties to this litigation. This rule, as stated in the case of *State v. Lavin*, 80 Iowa, 555 (46 N. W. Rep. 553), is as follows: "When a child is born in wedlock, the law presumes it to be legitimate, and unless born under such circumstances as to show that the husband could not have begotten it, this presumption is conclusive; but the presumption may be rebutted by facts and circumstances which show that the husband could not have been the father,—as that he was impotent, or could not have had access to his wife." The proof of non-access, however, must be clear and conclusive. Appellees contend that Harrison Bruce did not have access to his wife at or near the time the child was conceived, and that Ira A. Bruce is a bastard. It is claimed that Ira A. Bruce was born on the thirteenth day of April, 1864, and appellees introduced evidence to show that for two or more years prior to his birth Harrison Bruce was in the mountains of the west; and that his wife was in Iowa, living in adulterous relations with one Currier, to whom she was ostensibly married in October of the year 1862. It would serve no good purpose to set out the evidence in detail, and we content ourselves by stating the ultimate conclusions arrived at, bearing in mind that the evidence to overcome the presumption of legitimacy must be clear, satisfactory, and conclusive. We are fully convinced that Harrison Bruce was absent from the state at the time the child was conceived, and that he remained in the west until about three months before Ira Bruce was born. During his absence his wife was living in open adulterous relations with one Joe Currier, and had a very bad reputation for chastity. We are content to believe that the

child is the issue of these unlawful relations. Harrison Bruce, during his lifetime, frequently declared that the child was not his; and while the mother, on this trial, testified that Harrison Bruce was the father of Ira, she is so far impeached by contradictory statements that little dependence can be put upon her evidence. Ira Bruce knew as early as the year 1886 that Mary Bruce, his mother, was dealing with the property as if she was the sole owner thereof; knew that she was conveying and mortgaging it as her own, after she obtained the deed from Samuel; and that his heirship was questioned, if not denied; and yet he took no steps in assertion of his claim until January of the year 1894. At that time the title had passed from Mary Bruce to Mary Shirrey, and from Shirrey to one of the appellees. It had been mortgaged to various persons, and the appellee, the Bankers Life Association, held an unsatisfied mortgage thereon at the time this suit was instituted. While it may be that this does not constitute such laches as to bar appellants of their right to recover (a point we do not decide), yet these circumstances cast a cloud upon appellants' claim, and should be given due weight in arriving at the truth of their contention. If Ira Bruce had the interest he now claims, it is not likely that he would have delayed pressing the matter for more than eleven years after his father's death. And it is altogether improbable that he would have deferred his suit after he knew that the land had passed from his mother into the hands of a stranger, had he believed in good faith that he was entitled to a share of the estate, as well as to a part of the rents and profits. His delay certainly excites suspicion, and this suspicion is confirmed by quite satisfactory evidence that he is not the son of Harrison Bruce. The decree of the district court is **AFFIRMED**.

STATE OF IOWA V. HENRY EIFERT, Appellant.

Fraudulent Banking. A banker's son and employe received a deposit
 5 when the insolvency of the bank was known and an hour or two
 6 before it finally closed. He received this deposit contrary to a
 7 telephone message from the banker to take no more deposits.
 8 When the banker reached home, he having knowledge that the
 10 deposit had been received, made no effort to, and failed to return it,
 and four days later included same in a general assignment for the
 benefit of his creditors. *Held*, the banker himself is guilty of the
 offense of receiving and accepting a deposit knowing himself to be
 insolvent.

TRUST FUND. It is no defense that the depositor might pursue the
 9 deposit as a trust fund.

RATIFICATION AND ACCEPTANCE. On trial of a banker for receiving
 8 deposits when insolvent, it is proper to instruct that, though the
 deposit was received against defendant's orders, if, on learning
 that it had been received, he placed it among the funds of the
 bank, he "knowingly accepted and received" it within the statute.
 Such instruction rests the acceptance on defendant's own acts, not
 on the ratification of the acts of others.

INDICTMENT. An indictment for fraudulent banking which charges
 1 that the banker accepted a deposit from a person named, suffi-
 2 ciently states who was injured, and the owner of the deposit.
 Code, section 4305.

Cross-Examination. On trial of an indictment of a banker for receiv-
 3 ing money when insolvent, where defendant, to show want of
 4 connection with the transaction, testified that, on the morning of
 the day that the deposit was made, he left the town where his
 bank was located, and went to W., after promising to telephone
 his son, left in charge of the bank, if things did not look favora-
 ble, not to receive deposits, and that he sent that message, the
 court was not required to confine the cross-examination to what
 defendant did at W. It was proper to cross-examine as to any
 matter which tended, more fully, to disclose whether the want of
 connection asserted, existed.

SAME: Waiver. Where, on cross-examination, defendant is required,
 4 over objection, to testify to certain facts, he waives any error

102	188
104	694
102	188
126	297

102	188
1135	584

committed in overruling the objection by afterward testifying to the same facts, without objection.

Instructions. An instruction on trial of a banker for receiving deposits when insolvent, that it is enough that the deposit, though not received by him personally, was received under his authority, is not error, though the evidence is, that it was received against his order, where such charge is but part of the instruction, and aids in making plain a pertinent charge following, as to the defendant's accepting the deposit after it had been so received.

ROBINSON, J., dissenting.

Appeal from Bremer District Court.—HON. P. W. BURR, Judge.

THURSDAY, DECEMBER 12, 1895.

THE defendant was indicted and convicted of fraudulent banking, and sentenced to be confined in the state penitentiary for two years and six months, and to pay costs. He appeals.—*Affirmed.*

Gibson & Dawson for appellant.

The indictment does not in a specific or other manner aver or state whom the money alleged to have been deposited belonged to, or who was the owner of the same, or who was entitled to the possession of said money.

State v. McConkey, 20 Iowa, 576; 1 Wharton, Crim. L., sections 250, 251; 2 Wharton, Crim. L., section 2006; *Davis v. Commonwealth*, 30 Pa. 421; *People v. Horr*, 7 Barb. 9, and authorities cited; *State v. Mason*, 13, Ired. L. 341; *People v. Carpenter*, 5 Park. Crim. Rep. 228; *State v. Morrissey*, 22 Iowa, 159; *State v. Potter*, 28 Iowa, 556; *State v. Chicago, B. & P. R. Co.*, 63 Iowa, 509; Code, sections 4296, 4298.

There is nothing in the Code or subsequent legislation limiting or changing the rules of evidence pertaining to the cross-examination of witnesses.

State v. Red, 53 Iowa, 70.

A party has no right to cross-examine any witness except as to facts and circumstances connected with the matter stated in his direct examination.

Cokely v. State, 4 Iowa, 480; 1 Greenleaf, Ev., sections 445, 449; *Whitsett v. Chicago, R. I. & P. R. Co.*, 67 Iowa, 155.

If the financial condition of the defendant was what the prosecution claims it to have been, then, the deposit in question having been made at about the last hour of the last day on which the bank did business, it could have been collected back in full and was and would be treated under all the circumstances of its acceptance and receipt as a trust fund rather than a deposit received in the ordinary course of the banking business.

Wasson v. Hawkins, 59 Fed. Rep. 233; *American Trust & Savings Bank v. Gueder & P. Manufacturing Co.*, 150 Ill. 336.

ON PETITION FOR RE-HEARING.

Having instructed Theodore not to receive the deposit there could be no receipt of it that would render the defendant criminally liable unless he were personally present at the time of such receipt and consented thereto.

Reynolds v. Keokuk, 72 Iowa, 373.

Where a fraud is of such a character as to involve a crime, the ratification of the act from which it springs is opposed to public policy and cannot be permitted. When the indorsement of a note is forged, such indorsement cannot be ratified by the person whose name is forged, as the act is criminal and against public policy.

1 Am. & Eng. Enc. Law, p. 430; *Shisler v. Vandike*, 92 Pa. 447 (37 Am. Rep. 702); *McHugh v. Schuylkill*, 67

Pa. 391 (5 Am. Rep. 445); *Workman v. Wright*, 33 Ohio St. 405 (31 Am. Rep. 546).

Milton Remley, attorney general, and *Jesse A. Miller* for appellee.

The indictment is sufficient if the act complained of is stated with such a degree of certainty, in ordinary and concise language, and in such a manner, as to enable a person of common understanding to know what is intended to be charged.

State v. Golden, 49 Iowa, 48; *State v. Semotan*, 85 Iowa, 57; *State v. Emmons*, 72 Iowa, 265.

The fact that the defendant endeavored to establish by his evidence in chief was that the deposit of C. H. Mohling was received without his knowledge and against his will, and that he never accepted the deposit and never consented to its acceptance. Anything which would tend to contradict this evidence could properly be elicited upon cross-examination.

Bothwell v. Farwell, 74 Iowa, 324; *State v. Porter*, 34 Iowa, 131; *Player v. Burlington, C. R. & N. R. Co.*, 62 Iowa, 723; *Glenn v. Gleason*, 61 Iowa, 28.

Where the principal upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of his agent, he will be bound thereby, as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent which such acts, doings, or omissions reach.

Story, Agency, section 239; *Eadie v. Ashbaugh*, 44 Iowa, 519; *Fintel v. Cook*, 88 Wis. 485; *Crowe v. Capwell*, 47 Iowa, 426; *Farrar v. Peterson*, 52 Iowa, 420; Sackett, Instructions to Juries (2d Ed.), pp. 63, 64; *Pike v. Douglass*, 28 Ark. 59; *Meyer v. Morgan*, 51 Miss. 21, (24 Am. Rep. 617); *Hawkins v. Lange*, 22 Minn. 557; *Breed v. First National Bank*, 4 Colo. 481; *United States*

Rolling Stock Co. v. Atlantic & G. W. R. Co., 34 Ohio St. 450 (32 Am. Rep. 380); *Waterson v. Rogers*, 21 Kan. 529; *Heyn v. O'Hagen*, 60 Mich. 150; *Detroit v. Jackson*, 1 Dougl. (Mich.) 106; *Hall v. Chicago, M. & St. P. R. Co.*, 48 Wis. 317; *Stewart v. Mather*, 32 Wis. 344; *Drakeley v. Gregg*, 75 U. S. 8 Wall. 242 (19 L. Ed. 409).

The ratification of an act by the principal has the same effect as previous authority to do the act, and relates back to the time the act was done.

Berryhill v. Jones, 35 Iowa, 335; *Herriott v. Kersey*, 69 Iowa, 111; *State v. Shaw*, 28 Iowa, 67.

ON PETITION FOR RE-HEARING.

Where a name is forged it may be ratified, and if ratified it is binding.

Greenfield Bank v. Crafts, 4 Allen, 447; *Wellington v. Jackson*, 121 Mass. 157; *Cravens v. Gillilan*, 63 Mo. 28; *Crout v. DeWolf*, 1 R. I. 393; *Casco Bank v. Keene*, 53 Me. 103; *Forsyth v. Day*, 46 Me. 177; *Living v. Wiler*, 32 Ill. 387; *Hefner v. Vandolah*, 62 Ill. 483 (14 Am. Rep. 106); *Union Bank v. Middlebrook*, 33 Conn. 95; *Howard v. Duncan*, 3 Lans. 174; *Commercial Bank v. Warren*, 15 N. Y. 577; *Weed v. Carpenter*, 4 Wend. 219; *Fitzpatrick v. Caperton Cove School Tract Commissioners*, 7 Humph. 224 (46 Am. Dec. 76); *M'Kenzie v. British Linen Co.*, L. R. 6 App. Cas. 82.

KINNE, J.—I. The indictment charges the defendant with the crime of fraudulent banking, committed as follows: "The said Henry Eifert, on the fifteenth day of August, in the year of our Lord one thousand eight hundred and ninety-three, in the county aforesaid being then and there engaged in the banking and deposit business, under the name and style of Bank of Tripoli, and then and there being insolvent, and well knowing himself to be insolvent, did knowingly accept and

receive from C. H. Mohling a deposit in his banking and deposit business, the sum of one hundred dollars, consisting of gold and silver money, national bank bills, United States treasury notes and currency, and other notes, bills, and drafts circulating as money and currency, the particular description being to the grand jury unknown, to the amount and of the value of one hundred dollars, contrary to the form of the statute in such cases made and provided." The sufficiency of

this indictment was questioned by a demurrer,
1 which was overruled, and an exception taken.

It is urged that it is defective, in that it does not state whom the money alleged to have been deposited belonged to, or who was the owner of it, or entitled to its possession; that it fails to aver who, if any one, was defrauded. Section 1 of the act against fraudulent banking prohibits any bank, banking-house, or party engaged in banking or deposit business from accepting or receiving on deposit any money when such banking house or deposit office, firm, or party is insolvent. Acts Eighteenth General Assembly, chapter 153, section 1. Section 2 is as follows: "If any such bank, banking house, exchange broker, or deposit office, firm, company, corporation, or party, shall receive or accept on deposit any such deposits as aforesaid, when insolvent, any officer, director, cashier, manager, member, party, or managing party thereof, knowing of such insolvency, who shall knowingly receive or accept, be accessory to, or permit or connive at the receiving or accepting on deposit therein, or thereby, any such deposits as aforesaid, shall be guilty of a felony, and upon conviction, shall be punished by imprisonment in the state prison for a term not to exceed ten years, or by imprisonment in the county jail not to exceed one year or both fine and imprisonment, the fine not to exceed ten thousand dollars." Acts Eighteenth

General Assembly, chapter 153, section 2. In support of the contention that the indictment is defective because it fails to state the name of the injured party, counsel rely upon cases decided by this court wherein it was held that the indictment, in certain cases, must set out the name of the person injured, or attempted to be injured. We do not think it is necessary to discuss these cases. Let it be conceded that the indictment in this case must show who the injured party is,

and we think it must be held to conform to the law in that respect. It occurs to us that one reading this indictment would at once understand that the charge was that the money belonged to the person making the deposit; that he was the owner. If the act complained of is stated with such a degree of certainty, in ordinary and concise language, and in such a manner, as to enable a person of common understanding to know what is intended to be charged, it is sufficient. Code, section 4305. Can there be any doubt that such a person, on reading this indictment, would understand that it charged that the defendant, knowing that he was insolvent, did knowingly receive a deposit of money from Mohling, and that it was his money which was thus deposited? We think not. Now, one may own money, and may send it by some one to be deposited in a bank, but we should not speak of the mere carrier of the money as a depositor, but the one for whom it was in fact taken to the bank would be the depositor. The owners of money deposited in a bank are the depositors of that bank; that is, they are the people who made the deposits. We think that, read in the light of the requirements of our statute, the indictment, to the common understanding, as fairly charges that Mohling was the injured party as if it had in express terms stated that he owned the money which he deposited.

II. It is stenuously urged that the court erred in permitting certain questions to be asked the defendant on cross-examination. It appeared from the direct examination that the defendant
8 undertook to state his connection, or rather want of connection, with the making of the alleged deposit. He testified that he left town that morning early, and went to Waverly; that, prior to going, he had a conversation with his son about receiving deposits on that day; that he told him he was going to Waverly to look the ground over; and that, if things did not look favorable, he would send the son a telephone message, through a party who was with him, not to receive any more deposits, and to stop doing business; that he sent the message to his son to stop doing business, and not to receive any more deposits. On cross-examination, over the defendant's objection, he was required to testify when he returned from Waverly to Tripoli, and how long he remained in Tripoli, and as to whether he found any deposits had been made after 2 o'clock that day. The law, undoubtedly, is that the cross-examination must be confined to the matters about which the direct testimony is given. It is contended that on cross-examination the state was limited to what the defendant did at Waverly. We do not think so. The defendant was put upon the stand to show that Mohling's deposit was received without his knowledge and against his instructions; and to
4 show such facts, he testified as we have stated. The defendant having undertaken to explain his connection, or want of connection, with this deposit, and to show that it was received without his knowledge and against his will, any line of cross-examination which tended to contradict his testimony in chief, or which more fully disclosed his connection with this deposit, was proper. There was no error in

the rulings in this respect. Even if the cross-examination was improper, the defendant waived any error connected therewith, because, in the further progress of the trial, he testified to the same facts without objection. *State v. Wickliff*, 95 Iowa, 386 (64 N. W. Rep. 283); *Strong v. Railway Co.*, 94 Iowa, 380 (62 N. W. Rep. 802); *Bailey v. Bailey*, 94 Iowa, 598 (63 N. W. Rep. 341).

III. The eighth paragraph of the court's charge reads: "In determining whether the defendant received or accepted the alleged deposit of C. H.

5 Mohling, you are instructed that it is not necessary that the evidence should show, or that you should find, that the defendant in person received such deposit, nor that he was personally present when it was received from said Mohling, if received at all; it is enough if it was received by the cashier or agent of defendant under his authority. But you are further instructed that even though the defendant instructed Theodore Eifert to close the bank, and refuse to receive or accept further deposits, and that, after such instructions to so refuse deposits, the said Theodore Eifert did accept and receive from said Mohling the deposit in question, if so you find from the evidence, still, if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received from said Mohling by said Theodore Eifert, and placed among and treated it as a part of the funds or assets of the bank, having full knowledge from what source and under what circumstances and by whom it was received, he will be deemed to have knowingly accepted such sum as a deposit. If, however, such deposit was so received without his authority, and was not accepted by him, if at all, with full knowledge of the manner and circumstances of its being deposited, if at all, then he will not be deemed to have knowingly received or accepted such deposit."

Exception is taken to so much of this instruction as relates to the action of the defendant in knowingly accepting and retaining the deposit, after full knowledge from whom and under what circumstances it had been made. The argument of defendant is that when the deposit was received and accepted by defendant's son, and entered upon the books of the bank and upon the depositor's book, the whole
6 transaction was concluded. Now, the facts appear to be that the son had for a long time been in the bank, assisting his father; that the father was in the city of Waverly when the son, who had charge of the bank, received this deposit; that it was received on the afternoon of August 15, 1893, and several hours after the son had received a telephone message from his father to close the bank and to take no more deposits; that the father returned to Tripoli the same evening, and then learned that this deposit had been received, contrary to his orders; that said money was put into the assets of the bank; and that defendant never paid or tendered it back to Mohling. Now, when did defendant "knowingly accept and receive" this money as charged in the indictment? We think he must be said to have done so when he returned home, and first knew of the fact of its receipt. If he had given no directions to stop business and refuse further deposits, then it might be said that he should be concluded by the transaction when the money was in fact received by his son, who had authority to act for him. But, having expressly directed the son to cease business and refuse deposits, he had no reason to suspect or believe that his orders would not be obeyed. It cannot therefore be said that he knowingly received and accepted the deposit when it was handed to his son, and by him accepted, without the father's knowledge, and against his express directions. When, however, he arrived home that

evening, he became acquainted with all the facts; he then knew that this deposit had been accepted by the son after he had directed him to take no more deposits; he knew who made the deposit; he knew he was then insolvent, and that he had been before the son had received the deposit; and, knowing all the facts, he did not repudiate the transaction, but retained and accepted the money, at the same time knowing that his bank would never open again. It seems to us that when defendant, after full knowledge of all the facts, on the evening after his return, failed to repudiate the act of his son, and took no steps looking to a return of the deposit to Mohling, he then knowingly received and accepted the deposit. It must be borne in mind that this is not a civil action for damages for the recovery of the money deposited. It may be that in such a case recovery could be had of the defendant, notwithstanding the deposit was received by his agent contrary to his directions. But the gist of the offense charged in the prosecution is in knowingly receiving and accepting a deposit, knowing that he was then insolvent. Surely one whose agent, without his knowledge or authority, and in disobedience of his express instructions, receives and accepts for his principal money as a deposit, will not by such act be rendered liable criminally for knowingly receiving and accepting the money, but it cannot be doubted that, after coming into possession of all of the facts, the principal may so ratify the act theretofore done as to make it binding upon himself, and the basis of a criminal liability. If the defendant had, on being acquainted with what had been done, promptly disavowed the act of his son, and returned the deposit to Mohling, he would not have been guilty, as it could not then have been said that he had knowingly received and accepted the deposit. It seems to us the

instruction is correct, and quite as favorable to the defendant as he had a right to expect.

IV. Finally, it is said that the verdict is contrary to the evidence. This conclusion is reached by counsel on the theory that the acts considered in the third division of this opinion, and held by us to justify the instruction complained of, do not, if established, show a violation of the statute. We think the evidence fully sustains the verdict. Indeed, it is difficult to understand, under our view of the law, how the jury could have reached a different conclusion.

Discovering no error in the entire record, the judgment below is **AFFIRMED**.

SUPPLEMENTAL OPINION ON RE-HEARING.

SATURDAY, MAY 15, 1897.

FORMER decision *affirmed*.

GIVEN, J.—A re-hearing was granted in this case that we might, with the aid of further arguments, reconsider the objections urged by appellant to the eighth paragraph of the charge to the jury, or in other words, that we might review the conclusion announced in the third paragraph of the opinion. We have not at any time doubted the correctness of the opinion in other respects, and therefore limit our present inquiry to this one subject. In said instruction the jury was told, in effect, that it was not necessary that they find that the defendant had in person received the deposit, nor that he was personally present when it was received; that it was enough if it was received by the cashier or agent of the defendant under his authority; that though the defendant instructed his cashier to close the bank, and refused to receive further deposits; and that thereafter the cashier did

accept and receive this deposit. "Still, if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received from said Mohling, by said Theodore Eifert, and placed among and treated it as a part of the funds or assets of the bank, having full knowledge from what source and under what circumstances and by whom it was received, he will be deemed to have knowingly accepted such sum as a deposit."

Appellant's first complaint in his argument on re-hearing is that there is no evidence to warrant that part of the instruction to the effect that it was not necessary that the defendant should have
7 received the deposit in person, or have been personally present, nor that it was enough if it was received under his authority. It is true there was no evidence to which this part of the instruction, taken alone, could apply; but it was a correct statement of the law, and aided to make plain that which followed in the instruction. Appellant insists that in what follows in said instruction the court attempts to apply to this criminal charge the principle
8 of ratification. He contends that a criminal act cannot be ratified, and cites in support 1 Am. & Eng. Enc. Law, 430, and the cases therein referred to. The instruction does not submit the question of defendant's accepting and receiving the deposit by a ratification of what the cashier had done. It rests the question of accepting and receiving upon whether the defendant retained the deposit, and placed and treated it as part of the assets of the bank, with full knowledge of the circumstances under which it had been received by the cashier. The doctrine of ratification is not invoked to charge the defendant with having accepted and received the deposit as of the time it came into the hands of the cashier. The case was submitted upon the inquiry as

to whether the defendant accepted and received the deposit after being informed of the circumstances under which it had come into the hands of the cashier. In the instruction under consideration, the jury was told that if the defendant, with knowledge of the circumstances under which the deposit was received, accepted and retained it as a deposit, and placed it among and treated it as a part of the assets of the bank, "he will be deemed to have knowingly accepted such sum as a deposit." In the former opinion we said: "It seems to us that when defendant, after full knowledge of all the facts, on the evening after his return, failed to repudiate the act of his son, and took no steps looking to the return of the deposit to Mr. Mohling, he then knowingly received and accepted the deposit."

Appellant contends that, if the defendant and his bank were insolvent at the time the money was received, Mr. Mohling could pursue it as a trust fund in the hands of either the defendant or his
9 assignee, and recover it in kind, or its equivalent, if it had been so mixed with other money as to destroy its identity. He cites *Wasson v. Hawkins*, 59 Fed Rep. 233, and *American Trust & Savings Bank v. Gueder & Paesehke Manufacturing Co.* (Ind. Sup.) 37 N. E. Rep. 227. Whether such is the law we need not determine, for, if it be, it would apply with equal force if the deposit had been received by the defendant in person, or by his authority. If it be conceded that Mr. Mohling had the right to pursue that
10 deposit as a trust fund, it does not follow that defendant did not knowingly receive and accept it. He not only failed to repudiate the act of his son in receiving the deposit, and failed to return it, but, within four days after its receipt, included that money in a general assignment made by him for the benefit of his creditors. We have

re-examined the case with care, and reach the conclusion that the former opinion is correct, and it is therefore adhered to.—AFFIRMED.

ROBINSON, J. (dissenting).—The defendant was accused and convicted of the crime of fraudulent banking, in that, when insolvent and knowing that fact, he “did knowingly accept and receive from C. H. Mohling a deposit in his banking and deposit business, the sum of one hundred dollars.” The court properly charged the jury that it was not necessary to constitute the offense charged that the deposit should have been received by the defendant in person, but that it was sufficient if the deposit was received under his authority by his cashier or agent. *State v. Cadwell*, 79 Iowa, 435 (44 N. W. Rep. 700). But the court also charged the jury that, if the deposit was received by his agent in violation of his authority, “still if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received, * * * and placed among and treated it as a part of the funds or assets of the bank, * * * he will be deemed to have knowingly accepted such sum as a deposit.” It seems to me that this portion of the charge, as applied to undisputed facts in the case, was erroneous, and that the evidence is not sufficient to sustain the verdict. The law does not forbid an insolvent banker to retain a deposit properly received, but to accept or receive it; and whether the defendant is guilty does not depend merely upon his having retained the deposit in question, but whether, by his acts, he accepted or received it, within the meaning of chapter 153 of the Acts of the Eighteenth General Assembly, after he knew that it had been received by his agent in violation of his instructions. It is the general rule that, to constitute a crime, there must be a wrongful act, done with a criminal intent, or the

intentional doing of an act from which a criminal intent is conclusively presumed. 1 McClain, Cr. Law, sections 112, 128; 1 Bishop, Cr. Law, section 364, *et seq.* Wrongful acts, which create a civil liability, may fall short of crime, and the inquiry in this case is not whether the facts show that the defendant is civilly liable for the deposit in question, but whether his acts amounted to the accepting or receiving of the deposit, within the meaning of the statute. He is not charged with having permitted or connived at the accepting or receiving of the money.

The evidence shows, without conflict, the following facts: The defendant went from Tripoli to Waverly, in the morning of August 15, 1893. Before going, he talked with his son Theodore, who was left in charge of the bank, and stated that he was going to Waverly, "to look the ground over," and that, if things did not look very favorable, he would send a telephone message to the son to stop business, and not receive any more deposits. The defendant sent a message to that effect before 2 o'clock of that day. It was received by the son, but he did not obey it, because he thought his father took too gloomy a view of the situation, and received several deposits, including the one in question, after he received the message, and before 4 o'clock, when he closed the bank. The defendant returned at night, and was informed by his son that he had closed the bank, but that he had kept it open until 4 o'clock, and had received deposits, including the one made by Mohling. The defendant was dissatisfied that his order had not been obeyed, but did nothing with the money received. There is no evidence whatever, that he placed it among the assets of the bank. It had been received and placed with the funds of the bank by his son. There is no pretense that it had been kept apart from the money previously in the bank, nor that it could have been

identified and treated as a special deposit. It is not shown that the defendant took actual possession of it, but it seems to have remained where the son placed it until the assignment for the benefit of creditors was made. The bank was never opened after it was closed by the son, as stated. When he received the deposit of Mohling, the amount was entered in the pass book of the latter, and it is not shown that any other entry was made in any book until after the assignee had taken possession of the bank. The son then asked of the assignee the privilege of posting in the books the work done on the fifteenth of August. Mohling never made any demand for the return of the money he had deposited, and it does not appear that it was ever suggested to the defendant by any one that the deposit should be refunded before he made the assignment for the benefit of creditors. The entire amount due Mohling, including the deposit in question, was five hundred and forty-eight dollars and forty-four cents; and it is shown that, before the assignment was completed, the defendant endeavored to have Mohling commence suit, aided by attachment, to recover the amount due him, and represented that, if he would do so, he would obtain all of it. The total amount due Mohling, including the deposit in question, was set out in the schedule of claims attached to the assignment, but the defendant did not prepare the schedule. That was done by his attorney and his son, and he does not appear to have given the fact that the Mohling claim included the deposit in question any thought, but, if he had purposely included it, that fact would not have shown that he had accepted or received the money. That had been done, in violation of his instructions, by his son, and the money so mingled with the funds of the bank that it could not be identified. The unauthorized act of the son was effectual to create between the defendant and Mohling the

relation of debtor and creditor, *Independent District of Boyer v. King*, 80 Iowa, 500 (45 N. W. Rep. 908), because it was the right of Mohling, in the absence of actual knowledge of the limitation upon the power of the son, to rely upon the apparent authority with which the defendant had clothed him to receive the deposit. The relation stated having been established, it could not have been changed, and the money given the character of a special deposit, without the consent of Mohling. It is not shown that the defendant attached to his assignment an inventory of his assets, and the record is entirely barren of evidence to show that he had any intent in making the assignment to appropriate to his own use any money or other property which belonged to Mohling, or to alter their relation in any manner. The assignee acquired only the right of the defendant in the property assigned. *Meyer v. Evans*, 66 Iowa, 183 (23 N. W. Rep. 386); *Independent District of Boyer v. King*, 80 Iowa, 501 (45 N. W. Rep. 908). If Mohling had any special interest in or lien upon the property assigned while it was in the hands of the defendant, that interest or lien could have been enforced against the assignee. See *Bruner v. Bank* (Tenn. Sup.) 34 L. R. A. 532, and notes; s. c. 37 S. W. Rep. 286. It is my opinion that the evidence is sufficient to show a civil liability only; that it wholly fails to show that the defendant accepted or received the deposit in question within the meaning of the statute; and that it does not show any act on his part done with a wrongful intent, or from which a wrongful intent should be presumed. Therefore, I think the judgment of the district court should be reversed, and that the defendant should be awarded a new trial.

GUSTAVUS F. SWIFT AND EDWIN C. SWIFT, Appellants,
v. J. P. CALNAN.

Party-Wall: EXPRESS PROMISE TO REIMBURSE. One who builds a
1 party-wall partly on the land of a neighbor on the latter's express
2 promise to pay one-half of the expense thereof, when he shall use
it, may recover upon the promise at common law.

CONTRACT IN PAROL. A parol contract as to a party-wall which is
2 not different from that which the law makes, is not invalid under
3 Code, section 2030, which provides that special agreements about
such walls must be in writing.

MECHANIC'S LIEN. Though an express promise to pay half the
8 expense of building a party-wall is enforceable, no 'mechanic's
lien can be had to secure the said half cost.

CONSTITUTIONAL LAW. The provisions as to party-walls in Code,
6 sections 2019, 2020 and 2027, giving a lot owner a right to build a
7 wall not more than eighteen inches wide, one-half upon the land of
his neighbor, and to recover from the neighbor one-half the
expense thereof when the latter shall use the wall, cannot be held
so plainly in violation of the constitutional provision prohibiting
private property to be taken for private use without compensa-
tion, that they can be held invalid after more than forty years
recognition and enforcement, although their validity is not free
from doubt; but they must be upheld as an exercise of the police
power and as resting on the principle that equality is equity.

Construction of Contracts. Unconstitutional provisions of an act may
4 be considered in construing other provisions of the same act
which are confessedly valid.

Law and Equity: TRANSFER. The fact that an action at law is the
5 proper remedy is not ground for the dismissal of a suit in equity
under Code, section 2514, which provides, in effect, that an error
as to the kind of proceedings adopted shall not cause the abate-
ment or dismissal of the action, but merely a change into the
proper proceedings and a transfer to the proper docket.

Appeal from Clinton District Court.—HON. C. M. WATER-
MAN, Judge.

SATURDAY, MAY 15, 1897.

SUIT in equity to establish and foreclose a mechanic's lien. Plaintiffs and defendant are the owners of adjoining and contiguous lots fronting upon the same street. In November, 1892, they, with the knowledge and consent of the defendant, built a stone and brick wall thirteen inches wide upon the line between the two lots, so that the same could and would be a wall in common. Before the building of the wall, defendant agreed that it should be a wall in common, and promised and agreed to pay one-half the value thereof upon its use by him. In August, 1894, defendant erected a structure on his lots, and used and appropriated the wall built by the plaintiffs. The party-wall cost the sum of one thousand and eighty-nine dollars, and this suit was brought to recover one-half thereof, and to establish and foreclose a mechanic's lien for that amount upon the defendant's lot. Defendant demurred to the petition reciting these facts, on the ground that the plaintiffs were not entitled to any relief whatever. This demurrer was sustained, and plaintiffs appeal.—*Reversed.*

Hayes & Schuyler for appellants.

Statutes for walls in common, like our own, have existed in several of the states for years. This statute, which was in existence when our present constitution was adopted, has been repeatedly recognized by this court, and other courts of the states, and it has become a part and parcel of our system.

Zugenbuhler v. Gilliam, 3 Iowa, 391; *Wickersham v. Orr*, 9 Iowa, 253, 74 Am. Dec. 348; *Thomson v. Curtis*, 28 Iowa, 229; *Bertram v. Curtis*, 31 Iowa, 46; *Sullivan v. Graffort*, 35 Iowa, 531; *Molony v. Dixon*, 65 Iowa, 136 (54 Am. Rep. 1); *Crapo v. Cameron*, 61 Iowa, 447; *Cornell v. Bickley*, 85 Iowa, 219; *Sheldon Bank v. Royce*, 84 Iowa, 288; *Freeman v. Herwig*, 84 Iowa, 435; *Price*

v. Lien, 84 Iowa, 590; *Deere v. Weir-Shugart Co.*, 91 Iowa, 422.

This of itself is enough to debar the courts from disturbing it, even if theoretically they might, as a new question, doubt its constitutionality. This idea is sustained by the highest authority and the weight of reason.

Cooley, Const. Lim. (1st Ed.), 534; *Hoagland v. Wurts*, 41 N. J. L. 175; *Coster v. Tide Water Co.*, 18 N. J. Eq. 68; *Wurts v. Hoagland*, 105 U. S. 701, 26 L. Ed. 1109; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923; *State, Brittin v. Blake*, 36 N. J. L. 442.

It is quite possible that, in any state in which this question would be entirely a new one, and where it would not be embarrassed by long acquiescence, or by either judicial or legislative precedents it might be held that these laws are not sound in principle, and that they cannot be sustained by the maxims on which is based the right of eminent domain.

Cooley, Const. Lim. (1st Ed.), 536.

The provision of the statute requiring agreements relating to party-walls to be in writing relates to special agreements outside of the statutory provision and not in line with it.

Wickersham v. Orr, 9 Iowa, 253, 74 Am. Dec. 348; *Price v. Lien*, 84 Iowa, 590.

Where one party so builds a wall on a division line and the other owner appropriates and uses it as a joint wall in common, he is liable for its value, and this on ordinary and well-recognized principles of the law.

Zugenbuhler v. Gilliam, 3 Iowa, 391; *Rindge v. Baker*, 57 N. Y. 209 (15 Am. Rep. 479); *Bank of Escondido v. Thomas* (Cal.) 41 Pac. Rep. 462; *Guttenberger v. Woods*, 51 Cal. 523; *Zeininger v. Schnitzler*, 48 Kan. 63; *Thornton v. Royce*, 56 Mo. App. 179; *Walker v. Stetson*, 162 Mass. 86; *Day v. Caton*, 119 Mass. 513 (20 Am. Rep.

347); *Rice v. Roberts*, 24 Wis. 461 (1 Am. Rep. 195); *Deere v. Weir-Shugart Co.*, 91 Iowa, 422; 18 Am. & Eng. Enc. Law, page 3.

Walsh Brothers and *McCoy Brothers* for appellee.

The statute authorizing party-walls does not provide or contemplate the giving of a mechanic's lien therefor, and chapter 10 of McClain's Code of 1888, which contains all of the provisions relating to party-walls, nowhere makes any suggestion authorizing a mechanic's lien.

Section 3734, McClain's Code of 1888, and these sections construed together, have been held to mean that the two years' limitation commences to run from the expiration of the period of thirty or ninety days, as the case may be, whether the statement for the lien is filed within that time or not.

Squier v. Parks, 56 Iowa, 407; *Dimmick v. Hinkley*, 57 Iowa, 757.

Hence, no suit for the foreclosure of a mechanic's lien would be good at this late day, and said plaintiff would be entitled to no relief whatever in equity on account thereof.

Peters v. Phillips, 63 Iowa, 553; *Welsh v. Bayaud*, 21 N. J. Eq. 186.

An agreement that adjoining lot owners shall erect a party-wall on the line at their joint expense is a special agreement and must be in writing.

Price v. Lien, 84 Iowa, 590; *Crapo v. Cameron*, 61 Iowa, 447.

There can be no recovery unless there is a valid agreement between the parties.

Wilkins v. Jewett, 139 Mass. 29; *Allen v. Evans*, 161 Mass. 485; *Joy v. Boston Penny Savings Bank*, 115 Mass. 60; *Brooks v. Curtis*, 50 N. Y. 639 (10 Am. Rep. 545).

Speaking upon the question of unconstitutionality of party-wall statutes, Vice Chancellor Pitney says: "And I think it proper to say further, that, but for the express *dictum* of Chancellor Green in *Hunt v. Ambruster*, 17 N. J. Eq. 208, I should have thought an act or ordinance authorizing a party to build a wall on his neighbor's land to be, simply, not legislation, but usurpation."

Traute v. White, 46 N. J. Eq. 437.

DEEMER, J.—In support of the ruling of the lower court appellee insists: (1) That under the facts recited plaintiffs are not entitled to a mechanic's lien; (2) that the action is barred by the statute of limitations; (3) that the action cannot be maintained, because based upon oral contract, the statute providing that such agreements must be in writing; (4) that the party-wall statute, giving one person the right to build upon the land of his neighbor, is unconstitutional and void; (5) that, such statute being void, no recovery can be had for a wall erected thereunder; and (6) that where a building wrongfully laps over upon another's land, said person has the right to use it
1 without making compensation. In the statement preceding this opinion, it will be noticed that plaintiffs built the wall upon the dividing line between the two lots with the knowledge and consent of the defendant, and with the promise on his part to pay one-half the cost thereof as soon as he should use it. Without reference to the party-wall statute, plaintiffs were licensees, and, having rested half their wall on the defendant's land under an express promise by defendant to pay therefor when he should use it, there is no reason why they cannot, as at common law, recover upon the promise. *Rindge v. Baker*, 57 N. Y. 209; *Bodell v. Nehls*, 85 Iowa, 164 (52 N. W. Rep. 123); *Zugenbuhler v. Gilliam*, 3 Iowa, 391; *Day v. Caton*, 119

Mass. 513. It is said, however, that action is predicated upon the party-wall statutes, and that
2 such an agreement cannot be proven by parol.

These statutes, so far as material, are as follows: Code, section 2019: "In cities, towns and other places surveyed into building lots, the plats whereof are recorded, he who is about to build contiguous to the land of his neighbor may, if there be no wall on the line between them, build a brick or stone wall at least as high as the first story, if the whole thickness of such wall above the cellar wall does not exceed eighteen inches, exclusive of the plastering, and rest one-half of the same on his neighbor's land; but the latter shall not be compelled to contribute to the expense of said wall." Section 2020: "If his neighbor be willing and does contribute one-half of the expense of building such wall, then it is a wall in common between them, and if he refuses to contribute to the building of such wall, he shall yet retain the right of making it a wall in common by paying to the person who built it one-half of the appraised value of said wall at the time of using it." Section 2027: "Every proprietor joining a wall, has, in like manner, the right of making it a wall in common, in whole or in part, by repaying to the owner of the wall one-half of its value or the one-half of the part which he wishes to hold in common, and one-half of the value of the ground on which it is built, if the person who
3 has built the wall has laid the foundation entirely upon his own ground." Section 2030: "This chapter shall not prevent adjoining proprietors from entering into special agreements about walls on the lines between them; but no evidence of such agreements shall be competent unless it be in writing, signed by the parties thereto, or their lawfully authorized agents. * * *" Now, we have held that when

the contract is the same in fact as that which the law makes for the parties, it is not within the meaning of this section. *Wickersham v. Orr*, 9 Iowa, 253. The contract relied upon in this case is not different from that which the law made, and it is not void because it was in parol. It is said, however, that sections 2019, 2020, and 2027 are unconstitutional, because they authorize the taking of private property for
4 private use, and without compensation. Concede, for the purpose of the case, that this is so; yet how does this affect the validity of the contract made between the parties? If these sections are held unconstitutional and void, in so far as they authorize the building of a wall upon the property of another, they certainly should be considered in construing another section which appellee relies upon and concedes to be valid. While no right may be based upon an unconstitutional act, part of its provisions may be considered in construing other provisions, confessedly good, in arriving at the correct interpretation of the latter.

Appellee contends, however, that the agreement,
5 if good, cannot be enforced, because this is a suit in equity, and that remedy upon the contract must be by action at law. The ready answer to this contention is the statute (Code, section 2514), which provides, in effect, that an error as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings, and a transfer to the proper docket. See *Mills v. Hamilton*, 49 Iowa, 105; *Conyng-
ham v. Smith*, 16 Iowa, 471; *Lewis v. Soule*, 52 Iowa,
11 (2 N. W. Rep. 400); and many other cases noted in McClain's Code & Supp., at section 3719. It is
6 argued, however, that this action is founded upon the party-wall statute, and that this statute is unconstitutional, for the reasons before stated. That it comes very close to the line must be conceded. But

the fact that it has existed for more than forty years, and has been generally accepted and recognized as valid and enforceable, is strong reason for sustaining the act, even if we were disposed to doubt, as a new question, its constitutionality. *Cooley*, Const. Lim., p. 86; *Wurts v. Hoagland*, 5 Sup. Ct. Rep. 1086; *State v. Blake*, 36 N. J. Law, 443; *Bingham v. Miller*, 17 Ohio, 446. We think that the act in question is not so plainly in derogation of the constitution (article 1, sections 9, 18) as that we ought to hold it invalid. Indeed, in case of doubt, it is our duty to uphold the act. Titles to real estate are held subject to such legal conditions as may, from time to time, be established. They are subject to such statutory and police regulations as affect the safety and good order of society. A tract of land, from its mere location with respect to another, may owe it a servitude; and one must so use his own as not to unnecessarily injure another. As said in the case of *Evans v. Jayne*, 23 Pa. St. 34: "The law relating to party-walls is no invasion of the absolute right of property. It prescribes simply a rule for the convenient, economical, and safe enjoyment of property by the owner." And we may add that such law prevents disputes and unseemly contentions between "neighbors," and, as an exercise of the police power, is valid. See, also, *Hunt v. Ambruster*, 17 N. J. Eq. 208. What are known as "betterment statutes," or, as they are denominated in the laws of this state, "occupying claimants' acts," have been sustained on substantially the same theory. See *Tiedeman*, Lim., pages 366, 367, *et seq.*; *Cooley*, Const. Lim. (6th Ed.), pages 476-478, *et seq.*; *Childs v. Shower*, 18 Iowa, 261. Each of these enactments was borrowed from the civil law, and has for its basis the equitable doctrine that "equality is equity." Neither takes from the proprietor of the land anything except for benefits received. Nor can they be said to be violative

of the constitutional provisions with reference to private property, for the reason that they adjust the equities of the parties as nearly as possible according to natural justice. Under the party-wall statute, the adjoining proprietor is not bound to contribute to the expense of the wall. No burden is cast upon him until he makes such use of it as to indicate that he desires to use the wall in common. At most, he parts with the use of not to exceed nine inches in width off the side of his land as an easement in favor of his neighbor. Compulsory easements for the public good are quite common to our law. See the law with reference to drains, dams, and division fences. McClain's Code, sections 1826, 1845, 2322, *et seq.* There are some authorities which hold to a contrary doctrine. See *Wilkins v. Jewett* (Mass.) 29 N. E. Rep. 214; *Allen v. Evans* (Mass.) 37 N. E. Rep. 571; *Traute v. White* (N. J. Ch.) 19 Atl. Rep. 196. What is said on the subject in this last case is purely *dictum*, and contrary to the *Hunt Case, supra*. The other cases we do not regard as binding upon us, even if it be conceded they

7 hold to a contrary doctrine. Although, as we have said, there is considerable doubt as to the validity of the statute, yet it is not so plainly in violation of the constitution as to require an adverse decision. Plaintiffs are entitled to a judgment at law for the value or cost of one-half the wall.

The question remains, are they entitled to have a mechanic's lien established against defendant's property? It seems to us that they are not. When the defendant used and appropriated the wall, he

8 became liable to pay plaintiffs one-half the value thereof under the statute, or, it may be, under his contract. But this was a mere personal charge, and could not be enforced by establishing a lien upon the land. Phillips, Mech. Liens, section 78, and cases cited. Moreover, the material was not

furnished under a contract with the owner of the lot. There was simply an agreement to pay for material already furnished, or to be furnished at a subsequent time, and under other conditions than the mere furnishing of the material. Again, if the material was furnished under a contract with the owner, the statute of limitations is a complete bar to the action, for it must be brought within two years from the filing of the statement for the lien in the clerk's office, and this statement must be filed within ninety days after the material shall have been furnished. *Squier v. Parks*, 56 Iowa, 407 (9 N. W. Rep. 324). Plaintiffs are not entitled to a mechanic's lien, but they are entitled, under the allegations of their petition, to a judgment for one-half the value of the wall.—REVERSED.

THEOBALD HAUSER V. A. P. GRIFFITH, Appellant.

Evidence: PLEA OF GUILTY. In a civil action for assault, evidence
2 of a plea of guilty on a criminal prosecution is admissible as an
admission, but is not conclusive.

EXPLANATION OF. Where, in a civil action for assault, a plea of
4 guilty in a former prosecution is proven, defendant cannot show
the circumstances under which he entered his plea, though Code,
section 3650, provides that, when any act or declaration is given in
evidence by one party, the whole subject may be inquired into by
the other.

Exemplary Damages: FINE AS BAR TO. The fact that defendant in a
8 civil action for assault has been fined in a former prosecution is no
bar to an allowance of exemplary damages.

Appeal: HARMLESS ERROR. A judgment will not be reversed for the
1 admission of immaterial evidence which was not prejudicial.

PRESUMPTIONS. The absence from the record of conditions under
1 which prejudice might arise from a particular ruling, justifies the
conclusion that there was no prejudice.

Appeal from Bremer District Court.—HON. J. C. SHERWIN, Judge.

SATURDAY, MAY 15, 1897.

ACTION for damages for an assault and battery. Judgment for plaintiff, and defendant appeals.—*Affirmed.*

G. W. Ruddick for appellant.

Gibson & Dawson for appellee.

GRANGER, J.—I. The allegations are that the injuries were caused by kicking, and by beating and bruising with the fist. The court permitted the plaintiff to show, against objection, that his wife was living at the time of the injury, and was not living at the time of the trial. Complaint is made of the ruling. As the record appears in this court, the facts are immaterial. Appellee, in argument, says it was done to account for her absence as a witness, because she would have been a material witness as to plaintiff's condition after the injury. The difficulty in that respect is that the record does not show the fact of her knowledge on that subject. The abstract does not purport to contain all the evidence, but it does purport to contain all the evidence pertaining to each and every question presented by the assignment of errors, and necessary to a proper consideration of them, and each of them. The abstract is not questioned, and hence it is taken as true. Therefore we must hold the evidence to be immaterial. When we take into consideration the record as presented, and assume, as we may, the ordinary intelligence of the jury, it may be said to appear that no prejudice resulted. If there were facts with

which to associate the particular evidence, to give it significance or bearing on either a right of recovery or the amount thereof, they are not in the record, and we cannot assume them. The absence of conditions from which prejudice might arise justifies a conclusion that there was no prejudice.

II. The defendant had been accused on information of the crime of an assault and battery, and had pleaded guilty thereto. That plea was put in evidence on this trial, of which complaint is made. It is 2 thought, because of some language in *Crawford v. Bergen*, 91 Iowa, 675 (60 N. W. Rep. 205), that the authorities are not in harmony as to the admissibility of such a plea in evidence, in a civil suit like this. The holding in that case is that the effect of such a plea, when put in evidence, is not conclusive as to the fact of guilt, but that the party may show, in the civil suit for damages, that he was not in fact guilty. This holding is immediately followed by the language on which reliance is placed, as follows: "The admission of guilt should be held to apply to that trial only, because the parties are not the same, and the rules of practice and course of proceeding are different." The meaning is this: By the plea in the criminal suit there was an admission of guilt that was conclusive in that case. That conclusiveness pertained to that suit only, but the plea, as the act or declaration of the party, may be put in evidence in the civil suit, but not with the legal inference as to conclusiveness. If the court had said in this suit that the allegations of an assault and battery were established because of the admission of guilt in the other suit, it would have been permitting the admission of guilt to apply in another suit, but it did not, by simply permitting the statement or plea to be considered without that effect.

III. The jury was permitted to find exemplary damages. It appeared in the trial of this case, that in the criminal suit a fine was imposed and paid. It is urged, that that fact should defeat an allowance of exemplary damages in this case, because otherwise there is a double punishment. That the claim has strong support in reason hardly admits of doubt, but a contrary rule seems to have obtained in this state since the case of *Hendrickson v. Kingsbury*, reported in 21 Iowa, 379. Each party has seized upon particular language in that case for support of his claim; but, when all the language is considered, it makes the distinction between the punishment for the wrong done the public, for which the punishment is inflicted in the criminal action, and that done to the individual, for which punishment may be imposed by the jury in the civil action. *Reddin v. Gates*, 52 Iowa, 210 (2 N. W. Rep. 1079), is like this case in its facts, and conclusive of it. See, also, *Root v. Sturdivant*, 70 Iowa, 55 (29 N. W. Rep. 802). That other states have announced a different rule is true, but a review of the cases would be of no use.

IV. Defendant offered to prove the circumstances under which he entered his plea of guilty in the criminal action, which offer was denied. The right was claimed on the theory, that what was then said, was a part of the transaction or conversation, and permissible under the provisions of Code, section 3650, which provides that, "when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other." That precise question was ruled against appellant's theory in *Root v. Sturdivant*, *supra*. The judgment is **AFFIRMED.**

EVANS & McCLOUD v. THE WESTERN UNION TELE-
GRAPH COMPANY, Appellant.

102	219
108	590

102	219
144	619

Non-Delivery of Telegram: DAMAGES. Where a telegraph company
1 had no knowledge of an agreement that a car of horses was to be
2 shipped to San Antonio, in the absence of instructions to the con-
trary, its failure to deliver a message directing the car to be
shipped to Little Rock did not render it liable for the damages
resulting from the car being sent to the former place.

SAME. The car having been sent to San Antonio pursuant to the
1 previous arrangement, and not because sale at Little Rock was
3 lost by the company's negligence, the question of plaintiff's dili-
gence in sending the horses to San Antonio for sale is not
involved.

MEASURE. The loss of profits from a sale of horses resulting from
4 the failure of a telegraph company to deliver a telegram direct-
5 ing the shipment of the horses to a specified place, is properly
allowed to the owner, as damages naturally resulting from the
breach of the contract.

NOTICE. A message directing horses to be shipped to a named point
1 was sufficient notice to the telegraph company of damage which
6 might result from failure to deliver it.

EVIDENCE. A statement by a telegraph agent to the sender of a tele-
7 gram, on calling for an answer, that the message had not been sent
is admissible against the company in an action for failure to
deliver the telegram.

Appeal from Taylor District Court.—HON. W. H. TED-
FORD, Judge.

SATURDAY, MAY 15, 1897.

J. A. EVANS and Carr McCloud compose the firm of Evans & McCloud, and were engaged in the business of buying, selling, and shipping horses at Bedford, Iowa. In December, 1893, McCloud, while passing through Little Rock, Ark., to Magnolia, of that state, with a car load of horses, entered into an oral agreement with one Thaltheimer to deliver him another

car load as good or better as that he then had, on Thursday following, at a certain price per horse. The firm had nearly another car load at Bedford and, before McCloud left, had an understanding that Evans should ship these, with a certain pacer, to San Antonio, Texas, on Monday following unless he heard from McCloud. The latter handed the defendant's agent at Magnolia, Ark., the following telegram, on Saturday,

with the required fee for its transmission:

1 "December 16, 1893. To J. A. Evans, Bedford, Iowa: Ship horses Monday. Bill by way of Little Rock. Keep out Jim Cloud. C. S. McCloud."

The message was never sent, and the horses were shipped to San Antonio. This action is brought to recover damages occasioned by failure to transmit the message. Trial to jury; verdict and judgment for plaintiffs, and defendant appeals.—*Reversed*.

Smith McPherson and Sullivan & Sullivan for appellant.

J. B. Dunn and Flick & Johnston for appellees.

LADD, J.—The defendant should be compelled to make good any damages sustained by the breach of the contract to deliver the message, which were contemplated or might reasonably have entered into the contemplation of the parties at the time it was received, with the fee for its transmission. Special circumstances, unless made known, cannot affect the measure of damages; but, when made known at the time the contract is entered into, the damages will be such as naturally result from its breach under such circumstances. 1 Sedgwick, Dam., 122; 3 Sutherland, Dam., section 961. The fact that plaintiffs had arranged to ship the car load of horses from Bedford, Iowa, to San Antonio, Texas, in event

Evans did not hear from McCloud by the Monday following, was not communicated to the company or its agent, and it could not be expected to have had that in contemplation in receiving it. San Antonio, as a horse market, does not control the prices at Bedford; and the defendant could no more have anticipated a shipment of the horses there than to any other distant place, in event of failure to deliver the message. The damages occasioned thereby are not such as would ordinarily follow from such a failure. Only those which flow directly and naturally from the breach of the contract can be allowed. The district court received evidence of the shipment to San Antonio, the freight and expense connected therewith, and the price there received for the horses. No evidence was introduced tending to show the market value at Bedford or in Little Rock. This instruction on the measure of damages was given: "If you find for the plaintiffs, you will first allow them the difference in price
3 for which said horses were contracted, if they were, and the price actually obtained after their reasonable diligence to obtain a sale for the horses. In addition to this, plaintiffs may further recover for the difference in freight, if you find that it was reasonable care to ship to San Antonio. Also you will allow any other natural expenses made necessary, such as extra feed, stable rent, and extra car fare, if you find that the trip to San Antonio was the reasonable thing to do." We do not think the question of diligence is involved in this case. The horses were shipped to San Antonio in pursuance of a previous arrangement of the parties, and not for the purpose of disposing of property the sale of which had been lost by reason of the negligence of the defendant. If the plaintiffs suffered no damages by reason of the shipment to San Antonio instead of Little Rock, then, of course, no injury resulted from a

failure to transmit the message. As a rule, horses have a market value, and, if a person is deprived
4 of a sale by the negligence of the telegraph company, his measure of damages is the difference between the market value and the price agreed upon. There was evidence tending to show that McCloud, acting for plaintiffs, made the sale of a car load of horses to Thaltheimer, of Little Rock, to be there delivered on a day certain; that McCloud gave a message to defendant's agent at Magnolia, to be sent to his partner, Evans, at Bedford, Iowa, telling him to ship the horses from there to Little Rock on Monday; that the message was never sent, and that failure to forward the message rendered it impossible
5 to comply with the terms of the contract with Thaltheimer. If the sale had been completed, the profits, if any, accruing to the plaintiffs, would have been the difference between the reasonable cost or market value of the horses at Bedford, Iowa, and the price Thaltheimer was to pay, less freight and other costs incident to their shipment. The loss of such profits might reasonably have been contemplated by the parties, and constitute the damages naturally resulting from the breach of the contract, and we think recovery should be limited to such amount. See *Herron v. Telegraph Co.*, 90 Iowa, 129 (57 N. W. Rep. 696).

II. The message fairly apprised the company of the consequences likely to follow its non-delivery. The details of the transaction need not be disclosed, nor the particular business intended. It is sufficient if the results likely to follow negligence
3 in transmitting may be gathered, in a general way, from the wording of the telegram. *Manville v. Telegraph Co.*, 37 Iowa, 214; *Harkness v. Telegraph Co.*, 73 Iowa, 190 (34 N. W. Rep. 811); *Garrett v. Telegraph*

Co., 83 Iowa, 257 (49 N. W. Rep. 88). 3 Sutherland, Dam., 969.

III. The telegram required an answer, and McCloud was permitted to testify that when he called for this Monday, the agent told him the message had not been sent, and offered to return him the amount paid for its transmission. This was in explanation of why the answer had not been received, and was such information as the agent was authorized by his employment to impart. The telegram advised the company a reply was expected, and, when this was called for, if the agent knew none would come, it was his duty to so inform McCloud. It was a part of the same transaction, and not relating to past occurrences. The information was of a character such as the company was bound to give through its agent in order to act in good faith with its patrons.

IV. Whether there was a contract for the sale of the horses, and the price agreed on, and whether the telegram was in fact given to an agent of the company in charge of the office at Magnolia, were properly submitted to the jury. It is sufficient to say that the evidence on each of these issues is conflicting. The other questions argued are disposed of by what has been said, or will not be likely to arise on another trial.—REVERSED.

H. A. JANDT, Appellant, v. W. H. POTTHAST AND
HENRY A. POTTHAST.

False Representations: WRITTEN AND ORAL. In an action to recover
2 goods sold, false oral representations by the purchaser (on credit)
as to his financial condition may be shown by the seller, who sold
in reliance thereon, though written representations were made at
the same time.

SAME: Evidence of intent. Evidence that a purchaser of goods on
1 credit persisted in concealing an indebtedness to his father after
his attention was particularly called to written questions presented

to him to give the amount of his liability, is admissible, although he did not write down any answers to the questions themselves.

RELIANCE OF SELLER: *Credit man.* The seller may show by the
4 testimony of his credit man that he would not have sold on credit had he known the purchaser's real financial condition.

Memoranda by agent of seller. Pencil memoranda made by the
8 agent of the seller of goods on a statement by the purchaser as to his financial ability, to the effect that the latter bought the goods at a specified time and owes nothing on them, are admissible in evidence to show on what statements and representations, if any, the seller relied in making the sale.

JUDGMENT: REPLEVIN: *Parties.* In replevin, a judgment for the
6 value of the goods, in favor of a defendant who claimed them under a mortgage, but who did not introduce the mortgage or testify to any interest in the property, was erroneous.

Same. A judgment in replevin cannot be entered in favor of several
7 defendants where one of them claimed no interest in the property and did not ask for a judgment for its return or the value thereof.

SAME. A judgment in replevin should not make any adjudication as
5 to goods of which the plaintiff obtained possession otherwise than under the writ, and before the writ was levied.

Appeal from Carroll District Court.—HON. Z. A. CHURCH, Judge.

SATURDAY, MAY 15, 1897.

THIS is an action of replevin for the recovery of certain goods, or the value thereof, which it is alleged defendant W. H. Potthast obtained by false and fraudulent representations as to his financial condition, which representations were made orally and in writing; that said representations were false, and known to be so by said defendant when made, and were made with the intent of deceiving the plaintiff; that plaintiff relied upon the truthfulness of said representations in parting with the goods, and has elected to rescind the sale; that he has demanded a return of the property. Other necessary allegations were made. The answer is in denial. It admits, however, the sale of the goods; the election to

rescind; that the property is of the value claimed. Denies making any representations except in writing. Avers that he has executed to his co-defendant a chattel mortgage on goods, including those in controversy, and that said mortgage has been foreclosed. In a reply it is averred that said defendant has voluntarily returned to plaintiff a part of the goods he claims, of the value of two hundred and six dollars, and that goods to the value of two hundred and seventy-five dollars, only, have been taken under the writ; that there is a balance due on plaintiff's account, for goods not found, of seventy-eight dollars. Defendant denies that he ever returned any of the goods. The cause was tried to the court, and a judgment rendered for the defendants for two hundred and seventy-five dollars, with interest and costs. Afterwards, and on the application of the defendants, the sum of two hundred and seven dollars and eighty-four cents was added to said judgment, and a total judgment of four hundred and eighty-one dollars, with interest, rendered against plaintiff. Plaintiff appeals.—*Reversed.*

Strong & Owen for appellant.

Geo. W. Bowen for appellees.

KINNE, C. J.—I. When Allen, the plaintiff's agent, sold the goods to the defendant W. H. Potthast, the latter filled out and signed a printed blank statement for the purpose of obtaining credit. The statement was addressed to the plaintiff, and, in
1 part, read: "For the purpose of obtaining credit with your firm for merchandise, * * * I, W. H. Potthast, * * * do make the following full and complete statement of my resources and liabilities." Then followed a schedule showing various

resources, of over five thousand dollars, and no liabilities. On the liability side of the statement appeared the following, among other matter: "For merchandise,—give name and dates when due." "For borrowed money. When due. Rate of interest. Security." "Confidential and other debts not included in the above." "Does the above statement show all your debts and liabilities, of every kind and nature whatsoever?" None of the questions on the liability side of the statement were answered. At the bottom of the statement were found these words: "The above statement, both printed and written, has been carefully read by me, and is a full and correct statement of our financial condition and mercantile connection
2 at this date." It is signed by W. H. Potthast.

On the trial, plaintiff attempted to prove certain oral statements made by said defendant as to his liabilities at the time the order for the goods was given, to the effect that said defendant had stated and represented to the witness that he had no liabilities, which said statements were communicated to plaintiff before the goods were shipped. This evidence was ruled out, on an objection that it must be conclusively presumed that only the written representations were relied upon. This ruling is assigned as error. We are at a loss to understand upon what theory the court made its ruling. The proposed evidence was clearly admissible. It was admissible to show the intent of the defendant; that, after the matter of indebtedness was particularly called to his attention, he still persisted in concealing the fact that he owed his father two thousand dollars. This is a case of alleged false representation, and the evidence was admissible to
3 establish the same, regardless of the written statement. *Scroggin v. Wood*, 87 Iowa, 502 (54 N. W. Rep. 437), and cases cited. It appeared that the agent selling the goods made a pencil

memoranda on the statement to the effect that the defendant "bought the stock in February, and owes nothing on it." It was shown that such was the oral statement made by the defendant. It was improperly ruled out. It was material to show upon what statements and representations, if any, the plaintiff relied in selling and shipping the goods. If this oral statement of the defendant was not communicated to the plaintiff before the shipment of the goods, as a matter of course, he could not have relied upon the same in making the sale.

II. Plaintiff sought to show by the testimony of one Erwin, his credit man, that plaintiff would not have sold and shipped the goods on credit, had he known the defendant's real financial condition.

4 This evidence was ruled out as incompetent, immaterial, and irrelevant. It should have been admitted. It was material and relevant, for, if plaintiff would have made the sale in any event, he could not thereafter rely upon false representations made by the defendant. It was incumbent upon him to show that he would not have consummated the sale, had he known of defendant's real condition. It was shown that Erwin had sole charge of the matter of extending credit. He was therefore a competent witness to testify to the matter as to which plaintiff had vested complete control in him.

III. It is contended that the judgment is contrary to the evidence and to the law. As for other reasons the judgment below must be reversed, and, in view of another trial, it is better that we do not discuss the evidence.

IV. On the application of the defendants, and after judgment had been entered against plaintiff for the value of the goods actually taken under the writ, the court added the sum of two hundred and seven dollars and eighty-four cents to the judgment. This

seems to have been done on the theory that plaintiff should pay for goods which were not taken on
5 the writ, but had been turned over to plaintiff by the defendant. Plaintiff averred that said goods were voluntarily turned over by defendant to plaintiff. Defendant pleaded that one Rogers, acting as attorney for the plaintiff, obtained them by fraud, and sent them to plaintiff. No evidence was offered to sustain either claim. In some way the plaintiff obtained possession of this two hundred and seven dollars and eighty-four cents worth of goods otherwise than under the writ, and had actual possession of them when the writ was levied. It is very clear that these goods were not involved in this suit. This property was not taken, wrongfully or otherwise, under the writ. *Beroud v. Lyons*, 85 Iowa, 486 (52 N. W. Rep. 486); *Hove v. McHenry*, 60 Iowa, 227 (14 N. W. Rep. 301). The court had no jurisdiction over it in this action, and its action in rendering a judgment therefor was error.

V. It is claimed that the court erred in rendering a judgment in favor of the defendants. The claim is well founded. The defendant W. H. Potthast did
6 not claim any judgment in his pleadings, except for costs. It is hardly necessary to cite authorities to the effect that the finding and judgment must follow the pleadings, and that a judgment in replevin cannot be entered in favor of several defendants jointly when some of them have no interest in the property. W. H. Potthast claimed no interest in this property, nor did he ask for a judgment for its return or its value. *Cobbey*, Repl., section 1142; *Steele v. Matteson*, 50 Mich. 313 (15 N. W. Rep. 488). W. H. Potthast not having claimed the property, and not having shown himself entitled to a return of it, a judgment for its value in his favor was erroneous. *Wells*, Repl., section 491. The

defendant H. A. Potthast in his answer claimed the property by virtue of a chattel mortgage upon
7 it. He did not introduce his mortgage in evidence. He did not testify regarding any ownership of the property or claim upon it. In fact, there was no evidence whatever upon which to base a judgment in his favor.

VI. Other questions are discussed. As they are not likely to arise upon another trial, we do not pass upon them. For the reasons heretofore stated the judgment of the district court must be REVERSED.

102	229
104	389

N. J. NELSON, Appellant, v. HAMILTON COUNTY, IOWA.

Counties: FRAUD OF OFFICER IN SELLING SWAMP LANDS. One who
3 takes a quitclaim deed from officers authorized to sell swamp lands in behalf of the county, relying on their false and fraudulent representations that the land inured to the county under the swamp land acts, and misled by their concealment of the fact that the county had been adjudged not the owner, of which adjudication the county had made no record, may recover the consideration paid to it.

Quitclaim Deed: FAILURE OF TITLE. One who doth "grant, bargain
2 and sell, and quitclaim" land by a deed containing no covenant nor warranty of title is not liable thereunder for defect or failure of title.

Election to Stand on Demurrer. Where a demurrer to a petition was
1 sustained immediately before adjournment of the term, and an exception was then taken, the court did not abuse its discretion in permitting plaintiff to have till the next term in which to elect whether to plead further or stand on his petition.

Appeal from Hamilton District Court.—HON. B. P. BIRDSALL, Judge.

SATURDAY, MAY 15, 1897.

ACTION at law to recover on account of money paid to the defendant for land purchased of it. A demurrer to the petition was sustained, the plaintiff

elected not to plead further, and judgment was rendered for the defendant. The plaintiff appeals.—*Reversed.*

Hyatt & Hyatt for appellant.

A. N. Boeye for appellee.

ROBINSON, J.—The petition contains two counts. The first count states that on the second day of May, 1890, the defendant, a duly organized county of this state, acting through its proper officers, claimed to be the owner of a forty acre tract of land described, and sold it to the plaintiff for the sum of two hundred and sixty dollars and ninety-six cents, which was then paid by the plaintiff; that at the same time it executed and delivered to him a deed for the land; that in fact the defendant did not own, and never had, owned the land, nor any interest therein, and had no right to sell or convey it; that the deed did not convey any title to or interest in the land; that whatever title was attempted to be conveyed by the deed has failed; that the real owner of the land has asserted his title to and obtained possession of it, and that by reason of the facts stated the plaintiff has sustained damages in the sum paid for the land, with interest thereon from the date of payment. A copy of the deed is attached to the petition. The second count recites the sale, payment, and delivery of the deed set out in the first count, and states that the defendant, by its proper officers, represented to the plaintiff that it was the owner of the land, and had a good and perfect title thereto; that it had inured to the defendant under the act of congress of September, 1850, known as the "Swamp-Land Grant" and the acts of the general assembly of this state which related thereto, although the land had not been certified to the defendant; that there had not

been any adjudication of its title; and that the plaintiff was induced by the representations so made to purchase the land. The count further states that there had been an adjudication of the title of the defendant by a proper tribunal in an action to which the defendant was a party; that the land was adjudged to be not the property of the defendant, but of the Dubuque & Pacific Railroad Company, and from that adjudication no appeal was taken; that these facts were not made or kept of record by the defendant, and were concealed from the plaintiff; that the title thus conveyed has wholly failed, and the grantee of the railroad company has asserted his title, and taken possession of the land, and that by reason of the facts stated the plaintiff has been damaged in the sum of three hundred and sixty dollars. Judgment on but one of the two counts for the sum last stated is demanded. The grounds of the demurrer are that the deed to the plaintiff was a mere quitclaim deed; that the defendant is not responsible for false and fraudulent representations of its officers; and that no officers of the defendant had any power or authority to warrant the title to real estate, or to make representations in regard to its title.

I. The ruling on the demurrer was made on the last day of the September term, 1894, of the district court, and the plaintiff did not elect to stand on his petition until the first day of the next November term, when judgment was rendered. It is
1 said that the plaintiff should have elected to stand upon his petition at the term at which the ruling on the demurrer was made, in order to have the exception taken to the ruling heard. An exception to the ruling was taken when it was made, and there was no abuse of the discretion of the court in permitting the plaintiff to have until the next term of court in which to elect whether to plead further or not. The ruling was made just before the adjournment of court

for the term, and it does not appear that any demand for an election at that time was made.

II. The deed to plaintiff recites that the officers named in it, for a consideration stated, for and in behalf of the defendant "do hereby grant, bargain, and sell and quitclaim" to the plaintiff the
2 land in question. The deed did not contain any covenants nor warranty of title; therefore there was no liability on the deed for defects or failure of title. *Allen v. Pegram*, 16 Iowa, 172; *Funk v. Cresswell*, 5 Iowa, 84; Rawle, Cov., section 270, note. The first count of the petition is based upon the deed, but does not show any breach of contract, nor fraud in making the sale. So far as it shows the facts, the plaintiff may have known the nature and extent of the title claimed by the defendant, and relied upon his own knowledge in buying it. The count does not state a cause of action, and the demurrer thereto was properly sustained.

III. The second count of the petition does not show clearly that the plaintiff was ignorant of facts with respect to the title claimed by the defendant, nor that he relied upon the representations made to induce him to purchase the land; but no question of his knowledge or good faith in making the purchase is presented by the demurrer, hence will not be treated by us as material. We shall assume that he did not know that the defendant was not the owner of the land, and that he relied upon the representations made in purchasing it.

It has been said that counties "are involuntary political or civil divisions of the state"; that, "considered with respect to their powers, duties and liabilities, they stand low down in the scale or grade of
3 corporate existences," and that incorporated cities and towns are held to a much more extended liability. *Soper v. Henry County*, 26 Iowa, 267.

Nevertheless counties have certain powers given them by statute, and act through agents whose duties are derived from, and to a great extent are prescribed by, the law. As a general rule, when such agents act within the scope of their authority, the county represented is bound by their acts; and in some cases a county may be liable for the negligence of its agents or for their failure to act. By an act of congress, approved September 28, 1850, entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits," this state became entitled to all the swamp lands within its limits, which were unsold at the time of the passage of the act. By subsequent acts of the general assembly of this state the right to the swamp lands thus obtained, was transferred to the respective counties in which the land was situated, and each board of supervisors in the state, at the date of the conveyance in question, was authorized to sell and convey the swamp land within its county, under certain restrictions which need not be specified. It was the duty of the board of supervisors of the defendant to know, so far as the fact could be ascertained with reasonable diligence, what land belonged to the county, and also to know the result of litigation to which the county was a party. Therefore, if the board offered to sell the land to the plaintiff, and represented that the defendant owned it, the board was acting within the apparent scope of its powers; and in making the representations of ownership, and in concealing the fact that the county had been adjudged not to own the land, a fraud was perpetrated upon the plaintiff, which deprived him of the money he paid, and the defendant received, and still retains, the beneficial results of the fraud. The plaintiff does not appear to have been at fault in relying upon the statements made by its officers, and the defendant should not be

permitted to defeat a recovery for the money it has received wrongfully, on the ground that its officers exceeded their powers in making false representations. If the acts of its officers were unauthorized, and the plaintiff was blameless, in order to relieve itself of further liability it should have tendered the plaintiff the money it had received. See *Turner v. Cruzen*, 70 Iowa, 202 (30 N. W. Rep. 483). It is said that the records showed whether or not the defendant owned the land, and that the fact that the plaintiff accepted a quitclaim deed shows that he did not rely upon the representations made to him by officers of the defendant. But we do not think that is a fair inference from the allegations of the second count, which the demurrer admits to be true. They show that the plaintiff, was induced by the representations made by the officers to make the purchase, and that the facts in regard to adjudication of title had not been made of record by the defendant. It is true that the adjudication should have appeared of record somewhere, but whether in a state or federal court is not shown; and, although the land had not been certified as swamp, it does not appear that its character had been determined excepting by the adjudication referred to, and which was concealed from the plaintiff. If it be conceded that a search of the records would have shown that the defendant did not own the land, it would not follow, under the facts shown by the second count, that the defendant would not be liable for the representations of its officers. A further answer to the claim that the plaintiff should have searched the records, and that he did not rely upon the representations made to him, is that it was not in any manner presented by the demurrer. We have treated the case as though the defendant was represented in the transaction in question by its board of supervisors only. The petition states that the

defendant made a part of the representations "by its proper officers," without otherwise designating them, and the fair interpretation of the language used in connection with the statutes which apply to the sale of swamp land is that it referred to the board of supervisors, but, if anything was said or done to effect the sale by any duly authorized person, his representations and acts would be within the rule we have stated. It follows from what we have said that the demurrer, so far as it was directed to the second count of the petition, should have been overruled. The judgment of the district court is therefore REVERSED.

G. S. CHURCH, Appellant, v. J. F. LACY & COMPANY,
et. al.

Default: VACATION: *Original notice.* Where the notice stated that

- 1 a petition would be filed on or before December 1 (which was Sunday), and that the term would begin on December 9, and the petition was filed November 29, more than ten clear days before the term, the court had jurisdiction to render a default judgment, although December 1 was not ten clear days before the beginning of the term.

REMITTITUR. The inclusion in a judgment by default, for failure of

- 2 the defendant to appear at the return term of the original notice, of a claim not included in such notice, is not such an irregularity as justifies the setting aside of the judgment, after the plaintiff has filed a remittitur for the amount of such claim.

NEGLIGENCE OF ATTORNEY. Code, section 2837, subdivision 3 and

- 3 section 3154, subdivisions 3, 7,—granting relief from default judgments in case of accident, surprise, unavoidable casualty, or misfortune, does not cover a case where the attorney to whom defendant submitted his case, being about to remove to another city, told defendant he would inform his partner of his wishes, and leave the matter with him, but neglected to do so through forgetfulness.

109	235
103	540
102	235
*110	22
102	235
114	740

102	235
117	638

102	235
119	185
*119	186

102	235
127	450

102	235
128	82

102	235
137	630

102	235
140	307

Appeal from Kossuth District Court.—HON. GEORGE H. CARR, Judge.

MONDAY, MAY 17, 1897.

THIS proceeding is upon the petition of G. S. Church to set aside a judgment rendered on default against him in favor of these defendants at the preceding term of court, for reasons stated, and that he be allowed to defend against said action. These defendants answered, and the issues were tried to the court, and judgment rendered dismissing plaintiff's petition, from which he appeals.—*Affirmed.*

Geo. E. Clarke for appellant.

J. C. Cook for appellees.

GIVEN, J.—I. On October 11, 1889, appellees caused an original notice to be duly served on the appellant in Kossuth county, Iowa, notifying him that on or about the first day of December, 1889, a petition of these appellees would be filed in the office of the clerk of the district court of Kossuth county, Iowa, claiming of appellant one hundred and fifty dollars as damages "for over-driving a certain bay mare, 1 from which said mare died;" and that unless he should appear and defend on or before noon of the first day of the next term to be begun on the ninth day of December, 1889, default and judgment would be entered against him. A petition was filed November 29, 1889, and, appellant failing to appear or defend, default and judgment were entered against him on the third day of the term, namely, December 11, 1889. After the term, to-wit, December 21, 1889, appellant filed this petition, asking that said judgment be set aside, and that he be allowed to defend against said

action, alleging as grounds therefor that said judgment was irregularly obtained. The original notice was that a petition would be on file "on or before the first day of December, 1889," and that the term would be begun "on the ninth day of December, 1889." It is contended that, as December 1, 1889, was Sunday, and as there were not ten clear days between that day and the commencement of the term, the court had no jurisdiction to render said judgment. The notice, it will be observed, was that a petition would be filed "on or before December 1, 1889," and it was filed on November 29, 1889, more than ten clear days before the first day of the term. There was no irregularity in rendering the judgment, so far as this contention is concerned.

II. Appellees' action was to recover one hundred and fifty dollars damages for "over-driving a certain bay mare, from which said mare died." On proving up their damages, appellees showed that at the same time appellant had over-driven a certain other mare, to the damage of appellees in the sum of thirty dollars. Leave was given to appellees to amend, so as to include this claim, and judgment was rendered accordingly, though the amendment was not filed until five days thereafter. Appellant contends, that the court had no jurisdiction to allow this amendment, and to render judgment thereon by default, nor to render judgment thereon until the same was
2 on file. It appears, that after the commencement of this proceeding, to-wit, May 17, 1890, appellees filed a remittitur as to said thirty dollars, leaving the judgment to stand for one hundred and fifty dollars, with interest, and for costs. Let it be conceded that the court had no jurisdiction to allow said amendment, and to render judgment thereon; yet, as by the remittitur appellant stands unprejudiced

by that action, it is not such an irregularity as would justify the setting aside of the judgment.

III. As a further ground for the relief asked, appellant alleges that about the eleventh day of October, 1889, understanding that appellees were threatening to bring said suit against him, he went to A. F. Call, Esq., a practicing attorney in Algona, and submitted a statement of the case to him, and was advised that he was not liable on the claims; that he then and there employed said Call to defend any suit that might be brought by appellees; that said Call agreed that he would attend thereto, and notify the plaintiff of any suit that might be brought, and of the time when the court would sit; that, relying upon said Call, appellant went away; that about December 17, 1889, he learned for the first time that suit had been brought, and default and judgment entered against him, and that said Call had removed from Algona, and was not regularly practicing in the courts of Kossuth county. The evidence shows that, upon being

3 served with the notice, appellant went to the office of Clarke & Call, a firm of attorneys engaged in the practice in Algona, for the purpose of employing them to defend the case. He met Mr. Call, to whom he made his desire known, gave to him the copy of the notice, the names of witnesses, and offered to pay the retainer fee. Mr. Call informed appellant that he was soon to remove to Sioux City; that the firm would be dissolved; but that he would inform Mr. Clarke of appellant's wishes, and leave the matter in his hands to be attended to. Relying upon this, appellant gave no further attention to the case, expecting to be informed by his attorney when his attention or presence was desired, and he did not hear anything concerning the case until after the December term. Mr. Call failed to inform Mr. Clarke as to appellant's desire, and, having removed, was not

in attendance at the December term. On the day the docket was called for entering defaults, Mr. Clarke having understood from some source that appellant intended to defend, asked counsel for appellees to withhold taking default until he could examine his books, and see whether he might not have been retained through Mr. Call to defend. Mr. Clarke, having no information from Mr. Call, and finding no evidence of a retainer on his books, so informed appellees' counsel, whereupon, default and judgment were entered. It cannot be doubted, under the evidence, that the real and only reason why an appearance and defense were not made to appellees' action was that Mr. Call neglected to inform Mr. Clarke of appellant's desire that he should appear as his attorney, and defend the case. It seems that, in the pressure of business incident to his removal, Mr. Call entirely overlooked this matter, and neglected to inform Mr. Clarke, as he had agreed to do. Among the causes provided for granting relief such as that asked is "accident or surprise, which ordinary prudence could not have guarded against." Code, section 2837, subd. 3. Also, "irregularity in obtaining a judgment or order," and "for unavoidable casualty or misfortune, preventing the party from prosecuting or defending." Code, section 3154, subds. 3, 7. Mr. Call's failure to inform Mr. Clarke, as he had promised to do, was not caused by accident, surprise, unavoidable casualty or misfortune, but was clearly the result of his own neglect. Mr. Call says: "My partner, George E. Clarke, was away at the time, and when he returned I neglected to inform him of the engagement in the case, and when I left Algona to remove to Sioux City, a short time afterwards,—about the twentieth of October, 1889,—the matter wholly escaped my attention." Appellant cites several cases, an examination of which will show that they do not support his

contention that the neglect of Mr. Call is a sufficient ground for granting the relief asked. In *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 49 Iowa, 657, the failure to make defense was "through the mistake of the attorney respecting the time of the term at which the judgment was rendered, when the mistake arose not from neglect, but misinformation." In *Ordway v. Suchard*, 31 Iowa, 481, the rule is recognized that defaults should not be set aside in consequence of the party's neglect or that of his attorneys, but it was held that, where the party was prevented from defending "on account of an accidental misplacement of the petition and notice" by his attorneys, judgment should be set aside, the other requirements of the statute having been complied with. The court says that it was the intention of the party and attorneys to make a defense; "that there was no negligence of either party or attorneys; that their failure to put in an answer within the proper time was purely accidental." In *Jean v. Hennessy*, 74 Iowa, 349 (37 N. W. Rep. 771), the attorney had been assured by the judge at the former term, that nothing further would be done in the case without notice to him; that the attorney overlooked the fact that the term of the district court would commence in January, and, relying on the assurance of the judge, did not attend the term until informed that a default had been taken. The court says: "It is not necessarily an act of negligence to rely on such assurances." The reason for granting the new trial was evidently on the ground of accident or surprise. In *Ellis v. Butler*, 78 Iowa, 633 (43 N. W. Rep. 459), default was set aside, and the party permitted to defend, upon a showing of unavoidable casualty preventing him from defending. In *Trust Co. v. Jennings*, 81 Iowa, 471 (46 N. W. Rep. 1006), a new trial was granted because the default had been entered contrary to an agreement between

counsel. In neither of these cases was the default set aside merely because of the neglect of counsel; and in one, as we have seen, such neglect is held not to be sufficient ground for setting aside a default. This neglect of Mr. Call is not, under our statute, ground for granting the relief asked. The judgment of the district court is **AFFIRMED**.

LUKE LOGAN, Guardian, Appellant, v. HENRY McCAHAN,
Clerk.

Money Due Estate: PAYMENT BY CLERK TO ATTORNEY FOR EXECUTOR.

1 A final report of co-executors, L and M, was approved on "condition that said M pay over to the clerk of the district court" the sum in his hands as shown by the report. It was further ordered that L, "as executor of said estate, is hereby directed and empowered to proceed against the said M for the collection of said amount." L began attachment against M the next day, and the following day M paid said sum and the costs to the clerk, who entered on the court's order for payment, that he had received from M "the amount in his hands as shown by his report as executor, * * * pursuant to the foregoing order." On demand of L's attorney in the attachment suit, the clerk paid the three hundred and sixty-four dollars to the attorney, who failed to account for it. *Held*, that such payment was not justified, and the clerk was liable to the owner of the fund.

Objections Below. An objection to the method of adjudication cannot be first raised on appeal.

Appeal from Monroe District Court.—HON. T. M. FEE,
Judge.

MONDAY, MAY 17, 1897.

LUKE LOGAN and John Morrison were co-executors of the estate of John Logan, deceased, who left surviving certain minor heirs. In December, 1891, the executors filed their joint final report, which showed the separate accountings of the executors. Such proceedings were had thereon that

December 3, 1894, the court found that there were in the hands of John Morrison the sum of three hundred and sixty-four dollars, belonging to the estate, and the sum of three dollars and forty-five cents due Luke Logan from the estate, and on that day the court entered the following order: "It is further ordered and adjudged that the final report of the said executors be approved upon payment of \$3.45 to Luke Logan, and upon the condition that the said John Morrison pay over to the clerk of the district court the sum of \$364, the amount of the sum in his hands as shown by said report. It is further ordered and adjudged by the court that Luke Logan, as executor of said estate, is hereby directed and empowered to proceed against the said John Morrison for the collection of said amount. Signed in open court this third day of December, 1894. W. D. Tisdale, Judge Second Judicial District." In pursuance of the order, Luke Logan, on December 4, 1894, commenced a suit in attachment against John Morrison in the district court, praying judgment for the amount. On the fifth day of December, 1894, John Morrison paid the three hundred and sixty-four dollars, with the costs of the suit, to the clerk of the court, and the clerk gave to Morrison the following receipt: "Received, December 5, 1894, of John Morrison, defendant, the sum of three hundred and sixty-four dollars as principal, and the further sum of nine and ninety hundredths dollars costs. See opposite fee bill. Henry McCahan, Clerk." Morrison & McGrath were attorneys for Luke Logan in the suit commenced against John Morrison. On the same day, Ed. Morrison, of the firm of Morrison & McGrath, demanded the money of the clerk, who paid it to him, taking a receipt therefor, signed by Morrison & McGrath. The money was never paid to Logan. Luke Logan, having been

appointed as guardian for the minor heirs, filed his written motion, as guardian, reciting the fact that the money had been paid to the clerk by John Morrison, as ordered by the district court, and asked the court to order the clerk to pay over the three hundred and sixty-four dollars to him as guardian. The clerk, as defendant, answered, reciting the facts, including the proceedings in the attachment suit; that the cause of action was discharged by the payment of said money, and the receipt for the money was entered in the appearance docket. At the time the money was paid in by John Morrison, the clerk wrote on the order, made by the court for the payment of the money by Morrison, a receipt as follows: "\$364.00. Received December 5, 1894, of John Morrison, three hundred and sixty-four dollars, the amount in his hands as shown by his report as executor of John Logan, deceased, pursuant to the foregoing order. Henry McCahan, Clerk." Some evidence was taken, but there is nothing to change the legal inference from the facts stated. The district court denied the order for the payment of the money, and the plaintiff appealed.—*Reversed.*

T. B. Perry for appellant.

W. A. Nichol for appellee.

GRANGER, J.—I. It should be stated at the outset that no one impugns the good faith of the clerk in paying the money to Ed. Morrison. In fact, good faith is conceded. By way of caution, many facts have been brought into the record, most of which we have omitted from our statement, that are unimportant in the consideration of the case. Much importance is attached to the fact of the attachment suit, and that Morrison & McGrath were attorneys therein for Luke

Logan. It is the claim of appellant that because of the order of the court that the money should be paid to the clerk, and the order for Luke Logan to proceed to collect it, neither Logan nor his attorneys had any right to receive the money from Morrison, nor, after it was paid to the clerk, to take it from him. On the other hand, appellee contends that the suit was one for collection of the money by Logan, who had the right to receive it, and, as Morrison & McGrath were his attorneys, they had the same right, and reliance is placed on sub-division 3 of section 213 of the Code. The section is as to the powers of attorneys, and the third sub-division is as follows: "To receive money claimed by his client in an action or proceeding during the pendency thereof, or afterwards, unless he has been previously discharged by his client, and upon payment thereof, and not otherwise, to discharge the claim, or acknowledge satisfaction of the judgment." We may set at rest some of the contentions if we treat the case as if Morrison & McGrath had the same power to receive the money as had Logan himself from Morrison; and, had the money been paid by Morrison to Logan on the day it was paid to the clerk, we have no doubt that it would have been such a payment as would have relieved Morrison from further payment. The order to Logan was to "proceed against the said Morrison for the collection of said amount." We construe that to authorize Logan to collect the money and pay it to the clerk. We think the provision of the statute, as to the power of attorneys, authorized Logan's attorneys to act for him in so doing, and with like effect. There is no room for doubt that, in any event, the money must be paid to the clerk, under the orders of the court. Nothing in the order to Logan to proceed to collect the money changed the effect of the prior order as to where the money was to be placed. When placed there, the

accounts of both executors were closed, and, by operation of law, their future report stood approved. Thereafter neither had authority to proceed as executor, except by order of the court. The legal inference of a final settlement is a cessation of authority to further act in the way of administrative duties. Had the money been paid to the clerk by Morrison upon the order of the court being made therefor, without any order to Logan to collect it, we think no one would claim that, with the final reports of the executors thus approved, either Logan or Morrison would have had any authority to withdraw it, nor do we think that, under that state of facts, the clerk would have permitted it. It is, then, simply a question of how the attachment suit affects the situation. That does not seem to us a difficult question. The object of the order for Logan to collect, and of the suit in pursuance of it, was to bring the money to the clerk. When the money was in the hands of the clerk, whether placed there by Morrison or by Logan, the order of the court was satisfied. The taking of the money from the clerk was in violation, rather than in pursuance, of the orders of the court. As soon as the money was paid, the authority of Logan and of his attorneys ceased. The taking of the money from the clerk was taking it from the place where Logan and his attorneys were required to place it, if they had it. The power given to attorneys by section 213 of the Code is to enable them to take and place money where it belongs, and not to remove it therefrom. We attach importance to the fact that Morrison himself paid the money into court, taking the receipt of the clerk therefor, indorsed on the order of the court for its payment, and that Morrison intended the money to be applied in final settlement of the estate; and the clerk, in making the indorsement, must have known the purpose of the payment.

Much importance is attached to the fact that Logan was, by the order of the court in making the collection, an executor. It is true he was, but it was as to money for which he was not liable. His accounts had been settled. This was money held by Morrison for which Logan, as executor, was not liable. Code, section 2478. After the money was in the hands of the clerk, Logan, as executor, had no more right to remove it than had Morrison, who was also executor. The case in this respect is plain. It is further to be said that if this money was delivered because Logan was executor, independent of his duty to collect it under order of the court, then Morrison & McGrath were not his attorneys, and Logan never received the money from them, and is not bound by their acts.

II. The point is made that the court had no jurisdiction to try the case in such a summary manner. It does not present a jurisdictional question. Conceding there is a question as to the proper
 2 remedy, the defendant, without objection, submitted to the method of adjudication adopted, and the question of the regularity of the procedure cannot be first raised in this court. We think the motion for the order should have been sustained.—
 REVERSED.

THOMAS FARMER V. H. N. BROKAW, *et al.*, Appellants.

Evidence: CONCLUSIONS. Evidence by a witness that his "contract
 5 was made" with specified persons, is inadmissible, as a conclusion of the witness.

HARMLESS ERROR. Error in allowing plaintiff in re-direct examina-
 6 tion to state, as a conclusion, with whom the contract in suit was made, is harmless, where he immediately added that he had no contract other than the one he had detailed in his direct and cross-examination.

102	246
112	693
102	246
118	589
102	246
122	454

Joinder of Cause and Parties: INSURANCE COMMISSION. General
1 agents for an insurance company and a local agent of such com-
4 pany who retain and convert to their own use all the commissions
for obtaining an application for life insurance, are jointly liable to
one who acted with the local agent in effecting the insurance
under an agreement by the local agent to pay him half the com-
mission earned, ratified by the general agents.

Appeal: CERTIFICATION OF EVIDENCE: *Bill of exceptions.* A bill of
2 exceptions which states merely that plaintiff "to sustain the issues
3 upon his part, introduced the following" evidence (specifying it),
and contains similar statements in regard to the evidence for
defendants and in rebuttal, does not show that it contains all the
evidence.

BILL OF EXCEPTIONS: *Misconduct of counsel.* Alleged misconduct
7 of an attorney in his closing argument, set out only in affidavits,
cannot be considered on appeal where the bill of exceptions does
not show what the objectionable statements of the attorney were.

Appeal from Linn District Court.—HON. G. W. BURN-
HAM, Judge.

MONDAY, MAY 17, 1897.

ACTION at law to recover an amount alleged to be
due the plaintiff for services rendered in obtaining an
application for life insurance. There was a trial by
jury, and a verdict and judgment for the plaintiff.
The defendants appeal.—*Affirmed.*

C. D. Harrison and Jamison & Smyth for appel-
lants.

Henry Rickel and M. P. Smith & Son for appellee.

ROBINSON, J.—In the years 1891 and 1892 the
defendants Fleming Bros. were agents for the Mutual
Life Insurance Company of New York. Their terri-
tory included Linn county and fifteen other counties
of this state. The defendant H. N. Brokaw was a
local agent of the company at Cedar Rapids. In Sep-
tember, 1892, an application for a policy in the sum of

fifty thousand dollars was obtained of Mrs. Sinclair, of Cedar Rapids, and a policy for that amount was subsequently issued to her. It was delivered by Fleming Bros., who at the same time received a check for four thousand three hundred and sixty dollars, which was the first payment due for the policy. The compensation or commission which was to be paid for services rendered in obtaining the application was one thousand four hundred and thirty-eight dollars and fifty cents. Fleming Bros. had no right to that commission, but all of it belonged to the local soliciting agent or agents who obtained the application. The

1 plaintiff claims that he assisted Brokaw in obtaining the application, under an agreement by which the commission which should be earned in securing it was to be equally divided between them. All of it was in fact applied by Fleming Bros. as a credit on an indebtedness which Brokaw owed to them. The petition contains two counts. The first count alleges that in August, 1892, the plaintiff was engaged by the defendants to assist them in soliciting life insurance in the company named; that, acting for the defendants, the plaintiff and Brokaw secured the issuing of the policy to Mrs. Sinclair; that one-half of the commission therefor was to be paid to the plaintiff, under a verbal agreement made by him with the defendants; that Brokaw, having received the commission with the consent and approval of Fleming Bros., has ever since retained it, and refused to pay it or any part of it to the plaintiff, and that the defendants have taken it and converted it to their own use, and refuse to pay any part thereof to the plaintiff; that after the application for the policy was secured, the defendants orally ratified the contract under which the plaintiff was entitled to one-half the agent's commission, and orally agreed to pay to plaintiff one-half of such commission. The second count sets out at

considerable length the alleged agreement with the plaintiff, and the transaction which ended in the delivery of the policy to Mrs. Sinclair and the giving of the check to Fleming Bros., and alleges further that the check included the commission due the plaintiff and Brokaw; that, when it was given, the plaintiff called upon Fleming Bros. for the purpose of procuring his share of the commission; that Fleming Bros. admitted the receipt of the premium, including commission, but asked the privilege of using the check to have it photographed to promote their own business and that of the company, and told the plaintiff that they understood he was to have one-half of the commission, and that they would see that he received it; that at the time the plaintiff, being aware that Brokaw was betting upon the results of the election, was desirous of taking steps to secure his share of the commission, but, owing to the promises and assurances of Fleming Bros., took no steps to procure the same, but relied upon their promise that they would pay him as soon as they had photographed the check; that, notwithstanding their promise, Fleming Bros., with intent to defraud the plaintiff, without authority and in fraud of his rights, paid the money to Brokaw, who has since retained it; that Fleming Bros. and Brokaw, acting in concert with intent to cheat the plaintiff, have converted the money to their own use, and refuse to account for it. Brokaw filed an answer in which he denies the alleged agreement upon which the plaintiff relies, and denies all liability to him. Fleming Bros. filed an answer which contains a general denial and pleads a misjoinder of parties. The verdict and judgment were for one-half of the commission due on account of the Sinclair policy.

I. The appellee, in an additional abstract, denies that all the evidence introduced on the trial was made of record, and now claims that none of the questions

presented by the appellants can be considered, because it is not shown that all of such evidence is before us.

2 The facts upon which the claim thus made is based appear to be as follows: The evidence was preserved only by the shorthand reporter's report of the trial, and a skeleton bill of exceptions. It is not shown that the shorthand reporter's notes were certified by the reporter nor by the trial judge, nor is the transcript of the notes certified by the judge. The certificate of the shorthand reporter attached to the translation shows that it is a complete transcript of the notes as taken by him, but it is not shown that he took notes of all the evidence. The bill of exceptions was signed by the judge. That recites that "the plaintiff, to sustain issues upon his part, introduced the following oral, documentary, record, written and printed evidence, to which objection was made by the defendant, and motions made to strike out, all as set forth and contained in, or identified and referred to in, the official shorthand notes of the official shorthand reporter filed in this case." Then follows a direction in words as follows: "(Clerk will here insert the evidence introduced by the plaintiff, oral, documentary, record, written and printed, as contained, identified, or referred to in the official shorthand notes of the official shorthand reporter, together with the objections of the parties thereto, the motion to strike out, rulings of the court thereon, and exceptions of the parties taken thereto, as contained in the official shorthand notes of the official shorthand reporter)." Similar statements in regard to the evidence introduced by the defendants and by the plaintiff in rebuttal, and similar directions to the clerk following such statements, were set out in the bill of exceptions, and the shorthand reporter's notes were identified and made a part of it. That does not state, in direct terms, however, that it includes all of the

evidence introduced on the trial; and, unless we may presume that it does from the statements it contains, we cannot determine any question which involves the examination of all of the evidence upon which the district court and jury acted. The only statements of the bill of exceptions in regard to the evidence
3 are those to which we have referred. Is the statement that "the plaintiff, to sustain the issues upon his part, introduced the following" evidence (specifying it), equivalent to saying that he introduced that specified, and none other? And will that statement, and similar ones, in regard to the evidence for the defendants and the evidence in rebuttal, be equivalent to saying that the evidence thus identified was all which was introduced? We think both of these questions must be answered in the negative. The statements made may have been true, and yet the evidence identified may have been but a small part of that introduced. We conclude, therefore, that it is not shown that all the evidence introduced on the trial is before us.

II. At the close of the evidence in chief for the plaintiff, Fleming Bros. asked the court to direct a verdict for them, or to dismiss the cause as to them, on the alleged grounds that there was a misjoinder of parties defendant, and that there was a misjoinder of causes of action and parties defendant. The motion was overruled, and of that ruling the appellants
4 complain. We are of the opinion that it was correct. As we have seen, the first count alleges that the plaintiff was engaged by the defendants, that he and Brokaw acted for the defendants in effecting the insurance, that the defendants agreed to pay him one-half of the commission earned in the matter, and that the defendants have retained the commission and converted it to their own use. The second count

alleges that the plaintiff and Brokaw made the agreement under which the policy of insurance was issued, and were to share equally between them the commissions earned, that the commission in question was earned and received by Fleming Bros., and that they and Brokaw, acting in concert, and with intent to defraud and cheat the plaintiff, have converted the commission to their own use. The count also contains other averments, but those set out are sufficient, if true, to show a joint liability of the defendants, and there is no misjoinder of causes of action. In reaching this conclusion, we do not consider the evidence.

III. The plaintiff testified at considerable length on direct and cross-examination in regard to his alleged contracts with the defendants. On re-direct examination he was asked, "Well, now, state
5 with whom your contract was made," and answered, "My contract was made with the Fleming Bros. and with Mr. Brokaw." The defendants had objected to his question, and they moved to strike out the answer as not stating a fact, but the conclusion of the witness. The motion was overruled. It should have been sustained. The answer was in the nature of a conclusion of the witness, and he should have been confined to a statement of the facts involved in the making of the contract. Whether the contract he alleges was made with any one, and, if made, whether Fleming Bros. were parties to it, were material and disputed questions, which the jury, under the instruction of the court, and not the plaintiff, were required to decide. The question and answer were not of a preliminary character, but related to a vital issue in the case, and that is clearly
6 shown by the evidence we have before us. But we think the answer was not prejudicial, for the reason that on re-cross-examination the witness almost immediately stated that he had no

other contract than the one he had detailed in his direct and cross-examination.

IV. The appellants complain of certain portions of the charge given to the jury, and of the refusal of the court to give certain instructions asked by them. But the questions thus presented, so far depend upon the evidence submitted in the case, that we are unable to say that the charge was wrong, or that any of the instructions refused should have been given. Considered as mere statements of law, the charge is not erroneous. Portions of the instructions asked were included in the charge, and the portions omitted, so far as correct, may not have been applicable, under all the evidence received in the case.

V. The appellants complain of alleged misconduct of an attorney for the plaintiff in making the closing argument to the jury. It is set out only
7 in affidavits, which, as shown by numerous decisions of this court, are not competent to make such matters of record. The bill of exceptions recites that, while the argument objected to was being made, an attorney for the defendants stated to the court that he took exceptions to a certain statement made in the argument; that the court thereupon paid close attention to the statements of the attorney who was making the argument, but did not interrupt him, for the reason that it thought that what he said was legitimate comment upon the facts in the case. The bill of exceptions does not show what the statements to which objection was made were. If the defendants desired this court to review the ruling of the district court in holding that the statements were proper, they should have been incorporated in a bill of exceptions signed by the judge, or, if he refused to sign it, the signature of bystanders should have been obtained. Code, section 2835.

VI. What we have said disposes of all the questions presented in argument which the condition of the record permits us to determine. Prejudicial error in the proceedings of the district court is not shown, and its judgment is **AFFIRMED**.

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100 257

GILMORE & RUHL v. W. COHN, Defendant, D. O. JOHNSON, Garnishee, THE FIRST NATIONAL BANK OF OMAHA, Intervener, Appellants.

Garnishment: DEFECTIVE NOTICE: Waiver. A garnishee waives the defect in a notice requiring him to appear on a specified day before the first day of the next term of court instead of on such first day, as required by Code, section 2979, by voluntarily appearing and answering, although on the condition that the priority between such claim and others subsequently served shall be settled at a future time, and that no rights or claims are waived by taking the answer.

Appeal from Crawford District Court.—HON. G. W. PAINE, Judge.

MONDAY, MAY 17, 1897.

THIS is a contest between certain attaching creditors over their respective priorities to a fund now in the hands of the clerk of the Crawford county district court, arising from the sale of certain goods belonging to their joint debtor, Cohn, one of the defendants in this action. Plaintiff's attachment was first in point of time, but the intervener, the First National Bank, of Omaha, claims that it is entitled to priority, for the reason that plaintiff's attachment, which was served by garnishing one D. O. Johnson, a mortgagee in possession, notified him to appear at a time when no court was in session. The court below found against the intervener, and the intervener appeals.—*Affirmed*.

J. P. Connor and Byers & Lockwood for appellant.

Shaw & Kuehnle for appellees.

DEEMER, J.—The notice of garnishment served on Johnson, under plaintiff's writ of attachment, cited the garnishee to appear before the district court in and for Crawford county, commencing on the fifteenth day of February, 1893. The notice served under the writ issued in the intervener's case, cited the garnishee to appear at the said court on the first day thereof, which commenced on the twentieth day of February, 1893. Appellant contends that, as the notice of garnishment served in appellee's case notified the garnishee to appear at a time when no court was in session, no jurisdiction was obtained of the garnishee, and that its attachment, if of any validity, must be postponed to that of appellant. It should also be stated that the garnishee appeared on the first day of the February, 1893, term of said court, and his answers were then taken by agreement of the parties, upon this condition: "That the priority of the several claims should be settled at a future time, and that neither party, by the taking of the answer at that time and place, waived any rights or claims they had on the fund."

The question for our determination involves a construction of the statutes with reference to garnishment. The material sections of the Code relating to this subject are as follows: Section 2975: "The attachment by garnishment is effected by informing the * * * person holding the property that he is attached as garnishee, and by leaving with him a written notice to the effect * * * that he must retain possession of all property of * * * defendant then and thereafter being in his custody in order that the same may be dealt with according to law. * * *"

Section 2979: "Unless exempted as provided in the next section the notice must also require the garnishee to appear on the first day of the next term of the court wherein the main cause is pending * * * and answersuch interrogatories as may be then propounded to him, or that he will be liable to pay the entire judgment which the plaintiff eventually obtains against the defendant." The next section provides that when the plaintiff, in writing, directs the sheriff to take the answers of the garnishee, the sheriff shall put to him certain questions set out in the section; and the following section provides, in substance, that if the garnishee refuses to answer these questions fully and unequivocally, he shall be notified to appear and answer on the first day of the next term of court, and that he may be so required in any event if the plaintiff so notify him. Section 2984 provides that if, when duly summoned, he fails to appear and answer the interrogatories put to him, without sufficient excuse for his delinquency, he shall be presumed to be indebted to the defendant to the full amount of plaintiff's demand, and shall be dealt with accordingly. Following this is a section (2985) which says that for mere failure to appear he is not liable to pay the amount of plaintiff's judgment until he has had an opportunity to show cause against the issuance of an execution. A further provision relating to the whole chapter with reference to attachment and garnishment is to this effect: That the chapter shall be liberally construed, and that no attachment shall be quashed, dismissed, or released, if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued. Now, we have held in a number of cases that a proceeding by garnishment is in the nature of a proceeding *in rem*, and that for certain purposes, at least, a lien upon the *res* is created by the service of notice of

garnishment. The *res* in this case was the property in the hands of the garnishee; the proceeds of which were afterwards turned over to the clerk, and now constitute the fund in controversy. *Gage v. Maschmeyer*, 72 Iowa, 696 (34 N. W. Rep. 482). *McDonald v. Moore*, 65 Iowa, 171 (21 N. W. Rep. 504); *Fanning v. Railroad Co.*, 37 Iowa, 379; Rood, Garnishment, section 5, 193; Shinn, Attachment and Garnishment, section 467. Garnishment is also, in effect, an action by the defendant, against the garnishee in the name of and for the benefit of the plaintiff, and the garnishee may be made personally liable. *Citizens State Bank v. Council Bluffs Fuel Co.*, 89 Iowa, 618 (57 N. W. Rep. 444); *Mooar v. Walker*, 46 Iowa, 164; *McConnell v. Denham*, 72 Iowa, 494 (34 N. W. Rep. 298); *Clark v. Raymond*, 86 Iowa, 661 (53 N. W. Rep. 354). In the case of *Padden v. Moore*, 58 Iowa, 703 (12 N. W. Rep. 724), a garnishee was notified to appear on the ninth day of the October term of the Winneshiek county district court. On that day the garnishee went to the county seat, intending to make answer. Court was not in session, but had adjourned. Being advised of this fact, the garnishee returned to his home, and gave the matter no further attention. Upon re-convening, the court appointed a commissioner to take the answers of the garnishee, and a day was appointed for him to answer. The garnishee did not appear, and the commissioner so reported. At the following March term the court rendered judgment against the garnishee on his default. Thereafter a notice was served on the garnishee to show cause why execution should not issue. Garnishee made a showing, but for some reason it did not reach the court. Execution having been issued and levied upon certain chattels of the garnishee, he brought suit to enjoin the sale on the ground that the judgment against him was without jurisdiction, and void. A decree was entered dismissing the petition.

The garnishee appealed to this court, and the decree was reversed on the ground that the court had no jurisdiction of the person of the garnishee. The case is made to turn expressly upon the thought that the court below had no jurisdiction of the person of the garnishee, and the fact that the garnishee alleged that he was in no manner indebted to the execution defendant at the time the notice of garnishment was served upon him was regarded as material. Importance was also given to the fact that the garnishee did not appear in response to the notice. We held: *First*, that the garnishee was not obliged to respond to such a notice, for the reason that the statute requires that plaintiff cite the garnishee to appear at the first day of the next term of court; *second*, that he did not appear, and that the court had no jurisdiction to render a personal judgment; and, *third*, that, as he alleged he was not indebted to the execution defendant, the burden was upon the plaintiff to show that he was. The case differs in many important respects from the case at bar. Here the garnishee appeared, and submitted himself to the jurisdiction of the court, and he also admitted that he had certain property in his hands belonging to the attachment defendant. The court had jurisdiction of his person. The only other question is, did it have jurisdiction of the *res*? Turning to the first section of the Code quoted above, it will be seen that the appellee did everything that was necessary to effectuate the garnishment, so far as the property was concerned. It did not, it is true, direct the sheriff, in writing, to take the answers of the garnishee, nor did he in fact do so. It did, however, notify the garnishee to appear on February 15, to make answer, and further cited him to hold all property of the attachment defendant in his custody, in order that it might be dealt with as provided by law. We have held that

notice in writing is not essential when the sheriff takes the answers of the garnishee under section 2980. *Stove Co. v. Shedd*, 82 Iowa, 540 (48 N. W. Rep. 933). And we have also said that delay in taking the garnishee's answer will not be a ground for his discharge. *Boyer v. Hawkins*, 86 Iowa, 40 (52 N. W. Rep. 659). Yet further, in the case of *Fanning v. Railroad Co.*, *supra*, it appeared that an execution issued from the circuit court, and the garnishee was cited to appear at the district court. He had, however, made answers to the sheriff under Code, section 2980, and these answers were filed in the circuit court, and judgment rendered thereon. Under such a state of facts we held the judgment good. It seems to us, in view of these holdings, that the notice referred to in section 2979 is not essential to jurisdiction of the *res*, but is a prerèquisite to a valid personal judgment against the garnishee, unless he voluntarily waive it by appearing in court, and submitting himself to its jurisdiction. The notice referred to in section 2975 is essential to jurisdiction in *rem*, and of course cannot be waived. *Williams v. Williams*, 61 Iowa, 615 (16 N. W. Rep. 718); *Rock v. Singmaster*, 62 Iowa, 511 (17 N. W. Rep. 744); *Edler v. Hasche*, 67 Wis. 653 (31 N. W. Rep. 57); Rood, Garnish., section 271, and authorities cited. The lower court did not err in holding that it had jurisdiction of the *res*; that the garnishee waived the defect in the notice given him by voluntarily appearing and answering; and that plaintiffs' garnishment, being first in point of time, was first in right. We have support for our conclusions in the following, among other, authorities: *Westphal v. Clark*, 42 Iowa, 371; *Stockberger v. Lindsey*, 65 Iowa, 471 (21 N. W. Rep. 782); *Houston v. Walcott*, 1 Iowa, 86; *Hearn v. Adamson*, 64 Ga. 608; *Wellover v. Soule*, 30 Mich. 481; *Dittenhoefer v. Clothing Co.* (Wash.) 30 Pac. Rep. 660;

Howland v. Jenel (Minn.) 56 N. W. Rep. 581; *Wickam v. Lumber Co.* (Wis.) 61 N. W. Rep. 287. The judgment of the district court is **AFFIRMED**.

T. F. GREENLEE V. THE IOWA STATE INSURANCE COMPANY, Appellant.

Insurance: INCUMBRANCES: *Construction of policy.* The existence of a mechanic's lien on the "west 77 feet of the east 90 feet" of a specified lot does not show the breach of a condition against incumbrances in an insurance policy upon a specified building "situate on" such lot.

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

MONDAY, MAY 17, 1897.

ACTION on an insurance policy, dated February 17, 1894, covering a three-story brick building, under which there was a total loss, July 28, of the same year. The policy requires a true statement of all existing incumbrances to be made in the application, and provides that any misrepresentation or concealment therein shall render the policy void. The application indicated a mortgage of ten thousand dollars, but no other incumbrances. The defendant, in its answer, alleges that certain mechanic's liens had been filed against the property insured, which were afterwards foreclosed, and a sale had thereunder, and that by reason thereof, the conditions against incumbrances were violated, and the policy rendered void. Trial to jury. Judgment on verdict directed for plaintiff, and defendant appeals.—*Affirmed*.

McVey & McVey for appellant.

J. J. Mosnat for appellee.

LADD, J.—The clause in the insurance policy describing the property is this: "\$2,500.00 on his three-story brick building, occupied by tenants for store and office purposes, situate on lot 2, block 3, Hutton's addition to Belle Plaine, Benton county, Iowa." The defendant, to sustain the allegation of its answer alleging the existence of incumbrances rendering the policy void, offered in evidence a mechanic's lien claimed by Robert F. Smith, filed September 2, 1893, against "the west 77 ft. of the east 90 ft. of lot 2 in block 3 of Hutton's addition to the town of Belle Plaine, and all buildings situated thereon," and a decree foreclosing the same; also, a mechanic's lien claimed by J. F. Atkinson, filed September 4, 1893, against "the west 78 ft. of the east 98 ft." of the same lot, with buildings thereon, the decree foreclosing this lien, and the record of sale thereunder. Objection to each of these offers, on the ground that the evidence "did not show or tend to show any violation of any of the terms or conditions of the policy," was sustained. There was no evidence that the building on the land described in the liens and decrees was the same as that covered by the policy of insurance, and no offer was made to prove this. Whether it was the same, we have no means of ascertaining. The fact that only a part of the lot is described in the liens and decrees seems to indicate that it was subdivided, or that there may have been more than one building on the same lot. That several buildings are often erected on a single lot is a matter of common observation. There is no more reason for supposing a portion of the lot vacant, and only one building thereon, located on the part described, or a single building covering the entire lot, than that several buildings were on the same lot. One of the objects in describing the building was for the purpose of identification; and, had that insured been the same

as that against which liens were filed, such fact could have been readily proven. As the evidence offered did not establish any breach of the conditions of the policy against incumbrances, it was not error to exclude it. What has been said disposes of the case, and other questions argued are not considered.—
AFFIRMED.

THE ANCHOR MILL COMPANY, Appellant, v. THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant, and THE SIOUX FALLS NATIONAL BANK, Intervener.

Delivery by Carrier: SUBSEQUENT ASSIGNMENT OF BILL OF LADING.

- 1 Delivery of goods by carrier on order of the consignee, without presentation of bill of lading, to one who has paid the consignee therefor, vests title as against one to whom, after such delivery, the consignee transfers the bill of lading.

SAME. A carrier, by placing a car of goods on a side track at the point

- 2 designated as most convenient for unloading, by the person to whom the consignee has sold the goods, and directed the carrier to deliver them without presentation of the bill of lading, and by notifying such person thereof, makes a sufficient delivery to him of the goods as against one to whom the consignee thereafter transfers the bill of lading.

Appeal from Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

TUESDAY, MAY 18, 1897.

PRIOR to October 6, 1894, the Anchor Mill Company, of Cedar Rapids, Iowa, had contracted with the Lacey Grain Company, of Sioux Falls, S. D., for the purchase of four thousand bushels of wheat, which the latter company began shipping about September first, and on that day wrote to the plaintiff: "As cars of wheat are liable to arrive there ahead of draft, we inclose you an order on the agent to deliver you grain billed to us without presentation of bill of lading."

The following is the order inclosed: "Sioux Falls, So. Dak., September 1, 1894. Agent B., C. R. & N. R'y, Cedar Rapids, Iowa — Dear Sir: Please deliver all grain billed to us at Cedar Rapids, Iowa, to the Anchor Mill Co., without presentation of bill of lading. Yours truly, The Lacey Grain Co." This order was filed with the agent of the defendant railroad company at Cedar Rapids, and the wheat, prior to that in controversy, delivered to the plaintiff in pursuance thereof. The car load involved in this action arrived at Cedar Rapids October 5, 1894, at 5:10 p. m., and was placed by the defendant on the side track on Fourth avenue. Hershey, an employe of the defendant, whose duty it was to look after the cars, found this car on such track at about 7 a. m., October 6, and reported it there to Fox, chief clerk of the local freight department of defendant, who notified the plaintiff before 9 a. m. that the car had been placed on the side track for it. All cars of wheat were placed there at the request of plaintiff, as the most convenient place for unloading. On the tenth of October, the defendant received notice from the Sioux Falls National Bank that it held the bill of lading, and claimed the wheat, and thereupon notified the plaintiff not to take it. The plaintiff, however, took a part of the wheat, and defendant then removed the car back to its yards. Plaintiff thereupon began this action, claiming to be the owner thereof. The wheat was shipped from Trosky, Minn., to the Lacey Grain Company, consignee, October 2, 1894. The bill of lading was in the usual form, and on the back was indorsed: "Deliver to Anchor Mill Co. The Lacey Grain Company." During banking hours, October 6, 1894, and about 2 p. m., the Sioux Falls National Bank bought a draft of three hundred and twenty-five dollars of the Lacey Grain Company, and the latter transferred to said bank, by delivery, the bill of lading

of this car load of wheat. The bank filed its petition of intervention, claiming the wheat under such bill of lading. After all the evidence was introduced, the court, on motion of intervener, directed the jury to return a verdict finding the Sioux Falls National Bank entitled to the possession of the property in controversy, and afterwards rendered judgment on such verdict. Plaintiff appeals.—*Reversed*.

Rothrock & Grimm for appellant.

J. C. Leonard and *S. K. Tracy* for appellee railroad company.

Preston, Wheeler & Moffitt for appellee intervener.

LADD, J.—The main question to be determined in this case is whether the car load of wheat had been delivered to the plaintiff before the bill of lading was transferred to intervener. There is little or no
1 conflict in the evidence. The wheat was shipped by J. H. Denhart & Son, from Trosky, Minn., October 2, 1894, to the Lacey Grain Company, as consignee, at Cedar Rapids, over the Burlington, Cedar Rapids & Northern Railway. The agent at Cedar Rapids had an order from the consignee to deliver all grain billed to it at Cedar Rapids to the plaintiff without presentation of the bill of lading. When the car load in controversy arrived, it was placed on the side track on Fourth avenue. Fox, agent of defendant, testified: "I was conversant at that time with the arrangement between the railway company and the Anchor Mill Co. as to delivery of their cars of wheat. In pursuance of this written order, I had car No. 4,966 delivered upon the Fourth avenue side track by the general request of the Anchor Mill Co. to have their cars placed there. The Anchor Mill

Co. was notified by the railway company of the fact that this car was placed on that side track on the morning of the 6th." There are four side tracks on Fourth avenue, from which cars are loaded and unloaded. The Lacey Grain Company had sold plaintiff four thousand bushels of wheat, and, on shipments previously made, had overdrawn its account. October 1 it advised plaintiff: "We will allow the next car or two of wheat to go forward without any draft against them, in order to balance this overdraft." So the wheat had been paid for. Some question is made in argument as to whether the railway company was bound to deliver the wheat on the written order without presentation of the bill of lading. As the company did deliver in pursuance of that order, we need not inquire whether it was bound to do so. "Every delivery must be made to the right person, at a reasonable time, at the proper place, and in a proper manner." Hutchinson, Carr., section 340, and cases cited. What will constitute a delivery must of necessity depend upon circumstances. The railroad company, in order to deliver this wheat in bulk, certainly could not be expected to unload it. All that could be required was that it place the car where it could be safely and conveniently unloaded by the party entitled to it, and notify him of its action. When it had done this, its duties as a common carrier ended. *Independence Mills Co. v. Burlington, C. R. & N. Ry Co.*, 72 Iowa, 535 (34 N. W. Rep. 320). In this case the car was put at the very place plaintiff had requested, for the purpose of being unloaded, and the plaintiff duly notified of its action. What more could the railway company do to complete the delivery? It had delivered the car, in so far as it was capable of delivery, to the party entitled thereto, as directed by the consignee, within a reasonable time, at the very place agreed upon, and in the only manner practicable. Nothing

more could have been done. The delivery was complete, and the railroad company had lost control of the wheat before it received notice of intervener's claim; and, when it resumed possession, did so without any right or authority. The defendant's argument is based upon the proposition that where possession is obtained by a trick or fraud, or promise to pay freight as soon as delivery is made, which is not done, the carrier does not lose his lien for freight, but may retake possession. Hutchinson, Carr., section 480. The facts in this case present no such question. William Fulton, secretary of the Anchor Mill Company, testified: "The arrangement was that we weigh the cars of wheat, report weight of cars to the railway company. They would make out a bill, and we would give them a check. We had never, prior to the time they delivered the grain on Fourth avenue side track, weighed the wheat, nor the company made out the bill for freight." And this is undisputed. Besides, the company took possession of the car on account of the claim of the intervener, and not because of the non-payment of freight. We think the delivery of the car load of wheat to the Anchor Mill Company was made before 9 A. M., October 6, 1894; and, having paid therefor, it became the absolute owner of the wheat so delivered before the purchase of the bill of lading by the intervener.

II. It is insisted by appellee that the wheat could only be delivered by transfer of the bill of lading. *Garden Grove Bank v. Humeston & S. Railway Co.*, 67 Iowa, 533 (25 N. W. Rep. 761), is relied on. That the bill of lading represents the property while being transported, and its assignment operates as a symbolical delivery thereof, cannot be doubted. *Weyand v. Railway Co.*, 75 Iowa, 579 (39 N. W. Rep. 899); *Ayres Weatherwax & Reed Co. v. Dorsey Produce Co.*, 101 Iowa, 141 (70 N. W. Rep. 111). The bill of lading, however,

is not a negotiable instrument, and its transfer carries with it only such interest in the property as the
 2 assignor might transfer by actual delivery.

Certainly, the assignment of the bill of lading is not more effective in transferring title than manual change of possession. The intervener obtained no better title to the wheat than the Lacey Grain Company had when it parted with the bill of lading. *Haas v. Railroad Co.*, 81 Ga. 792 (7 S. E. Rep. 629); *Tison v. Howard*, 57 Ga. 410; *Shaw v. Railroad Co.*, 101 U. S. 557. Prior to that time the railroad company had fully performed its duties as common carrier by delivering the wheat to the plaintiff in pursuance of the order of the consignee and the indorsement on the back of such bill. The title to the wheat had passed to the plaintiff, who had already paid for it. The bill of lading had served the purposes of its existence, and was no longer a thing of value. Such a rule only requires that the purchaser of a bill of lading know the title to the property of the person from whom he buys. This is the general rule, and we know of no reason for making an exception in favor of one claiming possession by constructive instead of actual delivery of property. It follows that the district court erred in directing a verdict in favor of the intervener, and its judgment must be REVERSED.

ROBERT M. SIMONS V. THE IOWA STATE TRAVELING
 MEN'S ASSOCIATION, Appellant.

102	267
105	721
102	267
139	40

Insurance: NOTICE OF ACCIDENT. A letter by a member of an association insuring against accidents, stating that he had badly sprained his right foot, from favoring his left foot which had been previously injured, does not constitute sufficient notice of an accident to the right foot caused by stepping from a street car. Such notice must state the cause as well as the nature of the injury.

arrived in Lincoln the second day after. Dr. R. E. Giffen, my family physician, was called. My foot was swollen, and some inflamed. There was no pain in the ankle joint, to speak of. It seemed to be more in the heel than any place. The pain in my foot seemed to be in the heel, and right in the center of the heel." There is no pretense but that the recovery is sought because of the accident in stepping from the street car in Omaha, March 2, 1892. It will be seen that it was a well-understood accident, with the disabilities immediately following. To properly understand the letters claimed to constitute the notice, it will be well to state that in August, 1891, the plaintiff met with an accident resulting in injury to his left foot, of which notice was given, and the weekly indemnity was paid therefor, and it is to this injury that reference is made in the letters. March 7, 1892, plaintiff wrote the secretary of the association as follows: "Lincoln, Neb., March 7, 1892. F. E. Haley, Esq., Secty. Iowa State Traveling Men's Ass'n, Des Moines, Iowa—Dear Sir: I write to inform you that by the advice of my physician, Dr. R. E. Giffen, of Lincoln, Neb., who has been attending me during and since my injury in August, during which time I have been and am very lame; that he examined my right foot on Saturday, March 5, '92, and ordered me to lay up in bed or room, and under no circumstances to walk on it, as I had badly sprained the metatarsal bone of same and that was the cause of my disability, and it was caused from being lame and favoring my left foot that was injured Aug. 6, '91. I am not able to walk or work and so write to inform you of the fact. With regards, am truly yours, Robt. M. Simons." In another letter, under date of March twelfth, in answer to one from the secretary, plaintiff says: "I can clearly prove the cause of my being again laid up as to be from former accident." Again,

in a letter of April 8, 1892, after the thirty days, the plaintiff said: "There is no disease about it, and the doctor asked me when I had sprained the foot. I could not say, only at Omaha, March second, I was so lame I could not work. The supposition was that I had favored the left foot, and, by doing so, sprained the right one." These letters are the only claim of notice, and, while the two last ones contain considerably more than is set out, there is not even an indirect reference to the accident. The accident of which notice was to be given is not the injury alone, but the cause of it. By the letters, but one cause is indicated for the disability or injury in question, and that is the added strain upon the right foot in consequence of favoring the left one,—not yet strong, because of the former accident. This action is not to recover for such a case, and no such claim is made. The accident described in the petition is substantially that stated by plaintiff in his testimony, and it is said in the petition that the "injury was the direct result of the accident above stated." The cases make some exceptions as to the time in which notice may be given, where the facts were not, and could not be, known, so as to conform to the manifest intent of the parties to the contract, even though against its strict letter, but the issues here present no such question. In this case no notice was ever given of the accident for which recovery is sought, and it is to be conclusively said that, when the letters were written, indemnity because of such an accident was not contemplated. None of the authorities cited by appellee bear on this question. Error was assigned upon the action of the district court holding that the letters constituted sufficient notice. In this we think the court erred, and the judgment will stand **REVERSED**.

102	272
111	576

FOLEY & PAUL V. THE TIPTON HOTEL ASSOCIATION,
Appellant.

Evidence: COMPETENCY. In a suit by a sub-contractor against a corporation, to recover for extra work and materials, defendant's secretary was properly allowed to testify as to the authority of its building committee to order the extras, in the absence of any objection that it was not the best evidence, or of any proof that the board of directors kept a record of its proceedings.

ON VALUE. A member of a firm which has a contract for the erection of a building, and who shows a considerable knowledge of prices of labor and material, may testify as to what is a reasonable price for laying an extra wall.

OBJECTIONS. An objection to the introduction of evidence as incompetent and immaterial, does not raise the objection that it is not the best evidence.

Order of Proof: DISCRETION. The court did not abuse its discretion as to the order of proof, by allowing plaintiff to show the amount of work which he did for defendant corporation, before proving that the work was authorized.

Building Contract: EXTRAS. The owner may contract with the sub-contractor for extras, without regard to the provisions therefore in the written agreement between the owner and the principal contractor.

CONSIDERATION. The furnishing of extra material and labor by a sub-contractor at the direction of the owner, creates a contract on a sufficient consideration to render the owner liable for the extras.

Appeal: ABSTRACT SUFFICIENTLY FULL. An appeal will not be dismissed for incompleteness of the abstract if it is sufficiently full to present the facts in regard to the question to be determined.

TIME OF FILING AMENDMENT. An amendment to the abstract is not filed too late if the submission of the cause on the merits is not delayed.

Demurrer: PLEADING OVER: Waiver. Possible error in overruling a demurrer to the petition is waived by filing an answer.

Appeal from Cedar District Court.—HON. WILLIAM P. WOLF, Judge.

TUESDAY, MAY 18, 1897.

ACTION at law to recover an amount alleged to be due for material furnished and labor done on a hotel building. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

W. G. W. Geiger for appellant.

E. M. Brink and Preston, Wheeler & Moffit for appellee.

ROBINSON, J.—In July, 1894, Kelly & Mahan entered into an agreement in writing with the defendant to furnish all material and labor for, and to erect and complete, in the town of Tipton, a building to be used as a hotel, according to plans and specifications which were made a part of the agreement. The plaintiff, as sub-contractor, agreed with Kelly & Mahan to do the stone and brick work required for the building according to the plans and specifications referred to, and, as we infer from the record, executed its agreement. It claims that, in addition to what was done under the contract with Kelly & Mahan, it furnished material and performed labor for the defendant in doing extra work not required by its agreement with Kelly & Mahan, to the amount of more than three hundred dollars, for which judgment is demanded. The amount of the verdict for which judgment was rendered is two hundred and sixty-six dollars and fifty cents, besides costs.

I. The appellee filed a motion to dismiss the appeal and affirm the judgment of the district court

on the grounds that the abstract was not shown to be full and complete, and that the assignment of errors

was not sufficiently specific to present any question for determination. Abstracts are only required to be sufficiently full to present the

facts in regard to the questions we are required to determine, and we should not dismiss an appeal or affirm a judgment merely because the abstract did not purport to be a complete abstract of the entire record in the case. If there was any defect in the abstract as first submitted, it was cured by an

amendment filed by the appellant. The appellee moved to strike that amendment from the files on the ground that it was filed too late. It was not filed so late as to delay the submission of the cause on its merits, and following our practice, the motion to strike will be overruled. The assignment of errors is sufficient to present questions for our determination, and the motion to dismiss must be and is overruled.

II. The appellant complains of the overruling of a demurrer which it filed to the petition. After the ruling complained of was made, the defendant waived the error, if any, in the ruling by filing an answer.*

III. A witness named Leech, testified that he was a member of the Tipton Hotel Association, and that John H. Reichert, George Beatty, and C. W. Carl, were its building committee; that he was the secretary of the association, and that he supposed that the building committee had special supervision and the board of directors general supervision.

He was then asked: "They acted for the association in whatever they did, in the matter,—that is, that was their duty to do so?" The defendant

*This rule is affected by a statute since passed (Acts Twenty-fifth General Assembly).—REPORTER.

objected to the question as incompetent and immaterial. The objection was overruled, and the witness answered: "I think it was generally supposed that they were members of the board of directors, who were to be present and give attention to matters, and so far as I know, they did so." The appellant complains that the testimony thus given was incompetent, for the reason that the association could not be bound by the acts of a committee unless it was shown that the committee had authority, derived from the proper source, and that the only competent evidence of that authority would be the minutes of the proceedings of the board of directors, if it had the power to authorize the building
5 committee to act. It is not shown that a record of the proceedings of the board was kept, and the defendant did not object that the testimony of the witness would not be the best evidence. It does not appear that the witness was incompetent, and his testimony was not immaterial; therefore, the objection made by the appellant does not appear to have been well founded.

IV. E. L. Paul, a member of the plaintiff firm, was asked the following question: "Leaving out now the work you did, if any, as sub-contractor for Kelly & Mahan, state what work outside of that you did for the Tipton Hotel Association." The defendant objected to the question, "because there is no testimony showing that he had any contract with any person authorized to make a contract." The objection was overruled, and the witness answered the
6 question. The ruling was not erroneous. It was, of course, necessary for the plaintiff to show a contract, expressed or implied, for the material and labor in question, before it could recover for them, but the order in which the facts necessary to a recovery should have been proven was a matter of

procedure which was largely within the discretion of the district court, and no abuse of that discretion is shown. The witness was also permitted to state that the extras were put on the work and the material furnished with the knowledge of the Tipton Hotel Association. The appellant complains of this testimony on the ground that it did not have control of the building at the time to which the question referred. The testimony, considered alone, would have been of little value, but, taken with other evidence in the case which it tended to corroborate, it was material and competent to show an agreement between the plaintiff and defendant for the extras in question.

V. John E. Mahan, a member of the firm of Kelly & Mahan, was permitted to testify as to what was a reasonable price for laying a wall which the plaintiff claimed to have been an extra. He did not

7 show the highest degree of knowledge respecting prices of labor and material at Tipton, but his firm had the contract for erecting the building in question, and he showed considerable knowledge of such prices, and we think his testimony was admissible, to be estimated by the jury at its true value.

VI. The contract between the defendant and Kelly & Mahan provided that, in case of dispute respecting the value of extra work done by the contractor or omitted by him, its cost should be valued by two competent persons, one of whom was to be selected by each party, and, if those two persons did not agree, the matter in dispute was to be referred to the architect, whose decision was to be final. Testimony was offered to show that the plaintiff, although not a party to the contract, filed claims with the architect. The court excluded all of the testimony in regard to the proceedings in which the architect was concerned, excepting what was in the written settlement. That showed that the plaintiff had been allowed extras to

the amount of two hundred and six dollars and seventy-five cents. It is not shown in what respect the ruling of the court was erroneous. The claim of the plaintiff was submitted to the architect in writing, and no reasonable theory of error in the ruling, or of prejudice which resulted from it, is suggested by the appellant.

VII. The agreement between Kelly & Mahan and the defendant provided that the latter might make changes in the plans and specifications without impairing the validity of the agreement, and that, before changes were made, the cost thereof should be agreed upon. After testimony in regard to materials and labor for which the plaintiff seeks to recover had been given, the defendant moved to have it stricken out, and complains of the refusal of the court
8 to sustain its motion. The theory of the appellant is that its contract with Kelly & Mahan controlled, and that, as the plaintiff was a sub-contractor, it could not acquire any right against the defendant except through the agreement of the principal contractor. But that is manifestly incorrect. It was competent for the plaintiff and the defendant to enter into an agreement for extras without regard to the provisions for such extras made in the agreement with Kelly & Mahan. That firm had its remedy for any breach of contract which the defendant caused.

VIII. The appellant insists that the evidence did not show a valid agreement, supported by a consideration, for the extras in controversy. There was evidence from which the jury was authorized to
9 find that the plaintiff was directed and authorized by the defendant to furnish the material and labor required for the extras, and that they were furnished as directed. That was a sufficient contract

upon a sufficient consideration to make the defendant liable to the plaintiff for the extras in question.

IX. The appellant, after the verdict had been returned, and a motion for a new trial had been overruled, filed a motion in arrest of judgment on the ground that the petition did not show a cause of action. The motion was properly overruled. The petition showed that the defendant directed and authorized the plaintiff to furnish extra labor and material, and that they were furnished as directed.

What we have said disposes of all the material questions presented in argument. We do not find any ground for disturbing the judgment of the court below. The proceedings in that court appear to have been free from prejudicial error; and the evidence was sufficient to sustain the verdict. The judgment rendered is **AFFIRMED**.

102 278
f109 352

THOMAS F. BARBEE V. AULTMAN, MILLER & COMPANY,
Appellants.

Statutory Attorney Fees: INTEREST OF ATTORNEY IN. Prior to Act Eighteenth General Assembly, chapter 185, plaintiff's attorney had no interest in a judgment in favor of his client for attorney fees specially contracted for, in the absence of an agreement to that effect.

CONTRACTS BY CORPORATIONS. An agreement by one who turns over to an attorney certain judgments in favor of a corporation for collection, that the attorney shall have one-half the amount collected, binds the corporation.

Appeal from Carroll District Court.—HON. S. M. ELWOOD, Judge.

TUESDAY, MAY 18, 1897.

ACTION at law to recover attorney's fees taxed in a certain judgment obtained by the defendant and

collected by it. Plaintiff claimed to be the owner of these fees by virtue of an assignment thereof to him from O. H. Manning. The defendant denied the plaintiff's claim, and further pleaded a settlement with plaintiff. Defendant also pleaded a counter-claim against plaintiff for money unaccounted for. In reply, plaintiff pleaded the statute of limitations against the counter-claim, to which defendant responded by saying that plaintiff fraudulently concealed the collection of the money until the year 1892, and that the statute did not begin to run until it discovered the facts, which was during the year last mentioned. On these issues the case was tried to the court, a jury being waived, resulting in a judgment for plaintiff, and defendant appeals.—*Reversed.*

J. P. Conner for appellant.

F. M. Davenport for appellee.

DEEMER, J.—In September, 1875, and January, 1876, the defendant recovered judgments in the circuit court of Carroll county against one C. Karges, in each of which an attorney's fee of fifteen dollars was taxed. O. H. Manning was appellant's attorney of record in these cases. These judgments were apparently satisfied by an entry made on the judgment docket in each case on March 4, 1890, as follows: "Received from C. Karges payment and satisfaction in full of this judgment and costs. Aultman, Miller & Co., by Warren Gammon, Their Attorney." It is the attorney's fees, so taxed, with interest, that plaintiff seeks to recover from the defendant under a claim that he received an assignment thereof from O. H. Manning.

I. Appellant's first contention is, that there is no evidence that Manning was ever the owner of the

fees, no evidence that he ever assigned them to the plaintiff, no evidence that Gammon was the attorney for defendant, or had authority to satisfy the judgment, and no evidence that he did satisfy the judgments for attorney's fees. It is also insisted, that defendant is not liable, in any event, until demand is made upon it; and, as this was not done, that no recovery can be had. Further, the defendant insists that the court erred in not finding a settlement between the parties of the matters in dispute. O. H. Manning was originally the defendant's attorney at the city of Carroll. He was succeeded by a Mr. Macomber, and he in turn by appellee. After appellee became attorney for appellant, it placed in his hands for collection the judgments in suit. He failed to collect them, however. In April of the year 1887, a settlement was had between these parties, and the following receipt was given the appellee: "In consideration of the sum of one dollar, to me paid by Aultman, Miller & Co., the receipt whereof is hereby acknowledged by me, I hereby relinquish any and all claims I may have against Aultman, Miller & Co., and this receipt is a settlement in full and balances all accounts between Aultman, Miller & Co. and Thos. F. Barbee. [Signed] Thos. F. Barbee, Geo. W. Bowen, Attorneys for Defts." In the year 1882, plaintiff collected from one Bridenbach, a judgment, for the sum of one hundred and fifty dollars, owned by the defendant, and remitted one-half thereof, keeping the other half for his compensation. The appellant says, that at this time plaintiff was employed under a contract, by which he was to receive ten per cent. on claims collected without suit, and that he was not entitled to more than ten per cent. for collecting this judgment. To this, plaintiff responds by saying that he collected this particular judgment under a special arrangement with one of

appellant's agents, by which he was to receive one-half the amount collected, and he further pleads the statute of limitations, as before stated.

We turn now to the reasons relied upon by appellant for a reversal. At the time the judgments were rendered against Karges, attorney's fees were allowed on contracts specially providing for them as liquidated damages, and were either entered in the judgment or taxed as costs, according as the contracts provided. *McGill v. Griffin*, 32 Iowa, 446; *Williams v. Meeker*, 29 Iowa, 292; *McIntire v. Cagley*, 37 Iowa, 676; *Musser v. Crum*, 48 Iowa, 52. In any event, the recovery was by plaintiff, and on the theory that such expense as he was put to by the defendant's failure to perform his obligation was a proper subject to be contracted against. The attorney could not recover on such contract, for he was not in privity thereto. Again, the plaintiff was not obliged to prove the amount he had paid or had agreed to pay his attorney, for the recovery was without reference to this. The judgment being in favor of the plaintiff in the case, he had the right to satisfy the same, and, if the attorney collected it, he was responsible to his client for the amount collected. See *Root v. Heil*, 78 Iowa, 436 (43 N. W. Rep. 278); *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 55 Iowa, 157 (7 N. W. Rep. 474); *Daniel*, Neg. Inst. (4th Ed.), section 62a, and cases cited. Whether the plaintiff had a contract with his attorney for more or less than was recovered on the note was entirely immaterial, and whether the attorney was paid for his services was also regarded as unimportant. See cases first above cited. The judgment for fees was not held in trust for the attorney, for, in the absence of a contract between himself and his client, he had no interest in the amount recovered. The Eighteenth General Assembly passed what is known as "chapter 185," to remedy

the mischiefs which grew up under these holdings. See McClain's Code, sections 4159-4162.

The fees were not taxed in favor of Manning, and we are unable to tell from the record whether they were taxed as part of the costs, or simply included in the judgment. But the ultimate fact we do not regard as very material, for in neither event would the judgments show that Manning had not been paid for his services before they were rendered. Moreover, the undisputed evidence shows that the appellant had a full settlement with Manning for all claims held by him at the time it appointed Macomber as its attorney in his place. There is nothing in this record showing that Manning was entitled to the attorney's fees included in the judgments against Karges; and in the absence of such evidence plaintiff is not entitled to recover on his assignment. This conclusion relieves us from the necessity of considering the other points relied upon by appellant as a ground for the reversal of the judgment rendered in plaintiff's favor.

With respect to the counter-claim, the collection of the Bridenbach judgment is admitted by the appellee. But he claims that he held it under special arrangement made with appellant's agent, and not under the written contract. There was evidence tending to establish this claim, and the court below evidently found in favor of the appellee on this issue. It is insisted, however, that the party who made the arrangement claimed by plaintiff was not known to the defendant. However this may be, plaintiff testified that he made the contract with the person who turned over the judgments, as well as certain notes, to him; and, if this be true, defendant was bound by the agreement. Again, there was evidence to the effect that the written contract between the parties did not cover what were known as "old judgments," and that the Bridenbach judgment belonged to this class.

Complaint is made of certain rulings on the admission and rejection of evidence. As these rulings all relate to certain proposed evidence sought to be introduced for the purpose of meeting the plaintiff's plea of the statute of limitations, it is not essential that we consider the errors assigned thereon, for the reason that the lower court may well have found that defendant had no claim against the plaintiff, or, if it did have, that the same was settled at the time of the adjustment of accounts in April, 1887. We may observe in passing, however, that, if it be conceded that the court was in error, yet appellant suffered no prejudice, for the reason that it was permitted to prove substantially the same facts as it offered to establish by the questions to which objections were sustained. The judgment of the district court is of the same effect as the verdict of a jury, and it is not so wanting in support as to justify us in interfering. For error in allowing plaintiff's claim in the absence of proof that the fees belonged to Manning, the judgment is REVERSED.

JAMES FITZGERALD, Appellant, v. PATT NOLAN, MICHAEL NOLAN, and J. W. HANSON, Sheriff.

Surety and Contribution. One of two joint makers of a note, each of
1 whom received one-half of the loan for which it was given, is not a surety for the other, so that his property would be only secondarily liable for payment of a judgment against both, where the whole loan was made to him, and the one-half was received by the other in part payment of a debt due from him.

Appeal: costs. The costs of an additional abstract filed by appellee
2 will not be taxed to the latter on affirming the judgment, where the matters set out therein, although immaterial to the questions considered, would be material to other questions discussed and which would have been considered if the conclusions of the court on the questions considered had been different.

Appeal from Palo Alto District Court.—HON. W. B. QUARTON, Judge.

TUESDAY, MAY 18, 1897.

ACTION in equity to enjoin the collection of a certain judgment from the plaintiff. Decree was entered dismissing plaintiff's petition, from which he appeals.—*Affirmed.*

Soper, Allen & Morling for appellant.

C. E. Cohoon for appellees.

GIVEN, J.—I. As to the following facts there is no controversy: The plaintiff and Patt Nolan executed their joint promissory note to the Palo Alto County Bank for two hundred and six dollars, receiving therefor two hundred dollars, which they divided equally between them. When the note became due, the plaintiff paid one-half hereof. Thereafter the bank recovered judgment against both makers for the balance due on the note, with interest, costs, and attorney's fees. The bank assigned said judgment to the defendant M. J. Nolan, son and only child of Patt Nolan. M. J. Nolan thereafter caused an execution to issue and to be levied on the property of the plaintiff by defendant Hanson, sheriff. Plaintiff, claiming to be only surety for Patt Nolan for the amount of said judgment, brought this action to restrain the selling of his property until the property of Patt Nolan was first exhausted. Plaintiff alleges that the assignment to M. J. Nolan was to defraud plaintiff by securing the payment of said judgment from him by execution. We may say here, as to this allegation, that the plaintiff relies upon the testimony of M. J. Nolan and the attending circumstances to sustain it. While M. J. Nolan denies that he purchased

the judgment in pursuance of any arrangement with his father, we are satisfied that the purchase was for the purpose of enforcing payment by the plaintiff, and therefore consider the case as though the contentions were between the plaintiff and Patt Nolan alone. The plaintiff's claim is that he and Patt Nolan, each desiring to borrow one hundred dollars, joined in the execution of this note to the bank, each taking one-half of the proceeds, and that thereby, as between them, each became surety for the other for the one-half of the full sum of the note. While the defendants admit that Patt Nolan received one-half of the amount borrowed, they contend that the plaintiff was indebted to Patt Nolan in the sum of one hundred and twenty-five dollars, for a mare which he had purchased from Patt Nolan; that Patt Nolan desiring payment, and the plaintiff desiring to get one hundred dollars for other purposes, Nolan joined him in the execution of the note as his surety only; and that the one hundred dollars received by Nolan was on account of the purchase price of the mare. The testimony of these parties as to this disputed fact is conflicting, and not of a character to lead to a satisfactory conclusion one way or the other. The testimony of M. L. Brown, with whom the loan was negotiated, and who was examined on behalf of the defendants, leaves it reasonably clear that it was the plaintiff who wanted to get two hundred dollars. There is no question but that the plaintiff did get a mare from Patt Nolan, but plaintiff contends that it was in exchange for another horse. At the time plaintiff took the mare, he left a pony with Nolan, which, after a considerable time, was returned to the plaintiff. While it is left in doubt whether this was an exchange of animals, or a purchase of the mare we are led to believe that it was a purchase, because of what occurred in connection with the borrowing of the money as testified to

by Mr. Brown. Plaintiff contends that, the proceeds of the note having been divided, the presumption is that each maker, as between themselves, became surety for the other for one-half the debt, and that the burden is upon the defendants to overcome this presumption. Conceding this to be the rule, we think that by the testimony of Mr. Brown, the defendants have overcome the presumption. We think it fairly appears from the testimony of Mr. Brown that the entire indebtedness incurred by the note was the indebtedness of the plaintiff. This view of the facts renders it unnecessary that we should consider other questions discussed, and leads us to the conclusion that the decree of the district court should be affirmed.

II. Appellees filed an amendment to appellant's abstract, setting out a part of the record omitted, and also a stipulation as to certain facts. Appellant moves to tax the costs of this abstract to appellees, upon the ground that the matter therein contained is immaterial in the determination of the case. The matter set out is immaterial to the questions we have just considered, but is material to other questions discussed, and which would be considered had our conclusion upon the issue of facts been different. We think appellant's motion should be overruled.—AFFIRMED.

SAMUEL ROWE V. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

Setting Fire to Orchard: DAMAGES. Where plaintiff's orchard, covering nineteen acres, was burned by sparks from defendant's locomotive, the measure of damages is the difference between the fair market value of his farm, not including the grass or fences destroyed, before the fire and immediately after the fire

SAME. Where property destroyed by fire is so closely connected with the real estate that it has no value independent thereof, the measure of damages is the difference in the value between the real estate before and after the fire.

102	286
107	65
102	286
111	584
102	286
116	218
116	309
117	346
102	286
122	85
102	286
127	423
102	286
140	122
142	157
142	339

EVIDENCE. In an action to recover for injuries to a farm by fire, evidence of the income from the orchard destroyed by fire, for several years prior to the fire, is admissible.

Appeal from Mahaska District Court.—HON. D. RYAN Judge.

WEDNESDAY, MAY 19, 1897.

THE plaintiff claims damages for the destruction of an orchard, some grass, and a fence by fire, which he alleges was caused by the defendant in carelessly and negligently allowing fire to escape from one of its locomotive engines on October 11, 1892. Defendant denies all of the allegations of the petition. The cause was tried to the court and jury, and a verdict returned for plaintiff for one thousand seven hundred and forty dollars. Defendant appeals.—*Affirmed.*

Hubbard & Dawley for appellant.

L. C. Blanchard for appellee.

KINNE, C. J.—I. The orchard covered about nineteen acres of ground, and over nine hundred trees were burned or destroyed. These consisted of two hundred and fifty-three mature trees, four hundred and twenty-seven commencing to bear, and two hundred and fourteen seedlings. Besides, twenty-four trees were damaged; also some cherry trees and one peach tree. The court instructed the jury that, as to the orchard, the measure of plaintiff's damage would be the "difference between the fair market value of the plaintiff's farm of 160 acres, upon which said orchard was, not including the grass or fences injured or destroyed, immediately before the fire, and its fair market value immediately after the fire, as injuriously affected by said fire." The rule contended for by the defendant, was presented in instruction 2

asked by it, and refused. It was as follows: "The measure of damages in this case is the difference in value of the orchard just before and its value just after the fire, as an orchard." The question was also raised by objections to evidence. We think the rule announced in the instruction given by the court is correct, and it is supported by the great weight of authority. It is impossible to separate the orchard from the land in estimating the damages. Appellant's contention results in fixing the value of each tree destroyed or damaged by the fire, and the aggregate of such values would be the measure of plaintiff's recovery. Such a rule may well be held applicable to the destruction by fire of buildings, fences, and other improvements, which may at once be replaced, where the exact cost of restoring the property destroyed is capable of definite ascertainment, and where there is no damage to the realty itself. Here was a fire which destroyed several hundred apple trees. The trees which were left unburned were not in a body, but were in irregular patches, and disconnected. It needs no argument to establish the fact that the trees left unharmed, situated as they were, would not be worth as much to the farm as if they were left in a body together. One purchasing a farm with such an orchard on it, would make a material deduction in its value, on account of the condition in which the orchard was left. In no proper sense can it be said, that in such a case, can the value of the trees alone furnish any proper measure of the damages. The injury done is of a permanent character. The orchard cannot be restored to its exact condition before the fire, and it is uncertain whether it can, in many years, be approximately restored to its former condition. Surely, the injury will continue until remedied by the labor of man, and in such a sense, at least, it is permanent. Hale, Dam., 357.

Appellant relies on *Graessle v. Carpenter*, 70 Iowa, 166 (30 N. W. Rep. 392). We do not regard that case as controlling this. That decision was grounded upon the thought that "it was not shown that the acts complained of were of such nature as to permanently injure the real estate, or that the injuries cannot be repaired and the property restored to its condition before the trespass." We do not wish to be understood as approving the rule laid down in that case as applicable to damages to trees and shrubs; besides, the opinion was not unanimous. In the case at bar the injury is permanent. In *Greenfield v. Railway Co.*, 83 Iowa, 277 (49 N. W. Rep. 97), in speaking of growing timber kept for growth, this court said: "It was a part of the realty, and its loss affected the value of the realty." In that case the only question discussed was whether the measure of damages was the difference in the value of the timber land before and after the fire, and the court said: "It is manifest that the plaintiff suffered no less damage than the difference in the value of the timber land before and after the fire." In *Brooks v. Railway Co.*, 73 Iowa, 182 (34 N. W. Rep. 807), wherein recovery was sought for a locust grove burned, the court sustained an instruction to the effect the plaintiff was entitled to recover the value of the grove to the farm. The farm consisted of one hundred and twenty acres, of which twenty-five acres had been cut off by the railroad, and the grove was in that tract. The court said: "The defendant insists that the grove was valuable merely to this part. Each part, however, appears to have sustained some relation to the other part. The grove, doubtless, was designed to make the farm more habitable. If it had any value, its value, we infer, consisted principally in the fact that it furnished shade, and was a wind break, and perhaps, was ornamental, and so added somewhat to the value of the farm in its entirety." If a locust grove adds

to the value of a farm in its entirety, surely an orchard, which may be ornamental, and is certainly useful, must also add to the value of the entire farm.

2 The true rule in such cases is that, "when the property destroyed or injured is so closely connected with the real estate on which it stands or to which it is attached that it has no value separate and independent of the real estate, or the injury is to the soil itself, the measure of damages is the difference in value between the real estate before the injury and after it." 3 Elliott, R. & S., section 1239; *Hayes v. Railroad Co.*, 45 Minn. 17 (47 N. W. Rep. 260), and cases cited; *Railroad Co. v. Spencer*, 149 Ill. 97 (36 N. E. Rep. 91); *Moore v. Railway Co.*, 78 Wis. 120 (47 N. W. Rep. 273); *Dwight v. Railroad Co.*, 132 N. Y. 199 (30 N. E. Rep. 398), and cases cited; *Ward v. Railway Co.* (Minn.) 63 N. W. Rep. 1104; *Railway Co. v. Haynes* (Kan. App.) 42 Pac. Rep. 259; *Railway Co. v. Hoover* (Kan. App.) 43 Pac. Rep. 854; *Railroad Co. v. Wallace*, 74 Texas, 581 (12 S. W. Rep. 227); *Railway Co. v. Fulmore* (Tex. Civ. App.) 29 S. W. Rep. 688; *Railway Co. v. Countryman* (Ind. App.) 44 N. E. Rep. 265; 5 Am. & Eng. Enc. Law, p. 36. The above authorities support the rule of the instruction given as applicable to the case of an orchard destroyed by fire, as also to cases where soil is destroyed by fire. We have no doubt that the rule of the instruction is a correct exposition of the law as applicable to such case.

II. In addition to testifying to the value of the farm before and after the fire, the plaintiff was permitted, against the defendant's objection, to testify touching the income from the orchard for several years prior to the fire. Error is assigned
3 upon this ruling. The productiveness of the orchard was simply one element to be considered in determining the value of the land before and after the fire. True, usually, in such cases, the

witnesses for the claimant are simply asked to fix the value of the land before as well as after the fire, and the cross-examiner, if he sees fit, interrogates the witness as to what his opinion is based upon,—what matters he took into consideration in fixing the value of the land. However, we know of no rule of law which prevents the plaintiff from ascertaining from an examination in chief of the witness the facts upon which his judgment as to value of the land is based. It must be conceded that the product of the orchard is an element which adds to the value of the land. If such product is small, or of little value, the added value to the land may be comparatively small. Now, while it is true that the product for a certain year or years is no certain criterion of what it will be in other years, and while the price of the fruit may change, and the cost of producing it vary, still the amount produced in the past, and the value, may be shown, as indicating to that extent the basis upon which the witness had made his estimate as to the value of the land, and the cross-examiner may, as he did in this case, ascertain the correctness of the statement,—may show that trees die, that others become unproductive, that some years the product of the orchard is less in amount and of less value than it is in other years, and that some years it produces practically nothing. It is simply a question as to whether, on direct examination of the witness, he may be asked as to any fact which might properly be considered as an element entering into his judgment as to the value of the land. While the plaintiff is not bound, upon direct examination, to enter that field, yet he may do so, and, if the examination develops facts which show that the products of the orchard, or their value or cost of production, so vary that such evidence is unreliable as an element of value, it inures to the benefit of the defendant in lessening the weight of the testimony of the witness as

to the value of the land. We think there was no error in the ruling.

III. Some other questions are argued, relating to rulings upon evidence. We have examined them, and discover no prejudicial error. The judgment below is **AFFIRMED.**

THE GREEN BAY LUMBER COMPANY V. THE CHICAGO,
ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellant.

Carriers: CONNECTING LINES. Plaintiff shipped lumber to Des Moines over a certain railroad. The cars were delivered to a terminal company, engaged in switching cars, and tendered to defendant company to be hauled to points on defendant's line. Defendant refused to receive the cars, but offered to take the lumber on its own cars, stating that the first carrier had forbidden it to use the cars. Plaintiff, in a talk with the original carrier's agent, after the original contract of shipment was made, obtained from him permission for the use of the first carrier's cars by defendant in the shipment of plaintiff's lumber. *Held*, that an order of court, directing the defendant to receive the cars, and the lumber loaded thereon tendered by plaintiff, and transfer it over defendant's railway to stations set forth in the application, and to receive and transport "all such other and further cars, and lumber loaded thereon, as may be loaded with lumber of plaintiff, and under its direction and control, that plaintiff may hereafter tender for shipment over defendant's line," was not justified by Code, section 1292, providing that every railroad corporation shall draw over its road the cars of connecting railways.

Estoppel: MANDAMUS: *Carriers.* The fact that a railway company
2 based its refusal of a shipper's request that it receive the cars of a connecting road for transportation over its line, as required by McClain's Code, section 2039, on the ground that it did not want to do business with such company, does not prevent it from relying upon any legal excuse it had for its refusal, in a proceeding by mandamus, to compel it to receive such cars.

Appeal from Polk District Court.—HON. T. F. STEVENSON, Judge.

WEDNESDAY, MAY 19, 1897.

THE plaintiff company purchased a quantity of lumber in Minneapolis, and shipped the same to Des Moines, Iowa, over the lines of the Chicago, Milwaukee & St. Paul Railway Company and the Des Moines, Northern & Western Railway Company. Some of the cars reached Des Moines on the fourteenth of October, 1895, and were delivered to the Des Moines Union Railway Company, a merely terminal company, engaged in switching cars to and from the different roads entering Des Moines, and by it the cars were tendered to the defendant company, by direction of the plaintiff, to be hauled by said company to points west on its line. The defendant company refused to receive the cars belonging to the other roads, but offered to take the lumber in its own cars to its destination. Under protest, the plaintiff transferred the lumber to defendant's cars, and it was carried forward. On the twenty-fifth of October, 1895, two more cars arrived, and were tendered and refused under like circumstances, and this action was commenced, asking for a mandatory injunction or order to compel the defendant company to receive the cars in question, and others that may be tendered, and haul them to their destination on its line. The district court granted the order, and the defendant company appealed.—*Reversed.*

Carroll Wright for appellant.

C. C. & C. L. Nourse for appellee.

GRANGER, J.—Some facts particularly relied on by appellant are that the shipment from Minneapolis was not a through shipment to points west of
1 Des Moines, but a shipment to Des Moines only, and when the lumber reached Des Moines the shipment was at an end, and the taking of the

lumber by the defendant company would be a re-shipment; that the defendant company had cars of its own, then on hand and ready for such service; and that it had received notice from the company owning the cars in which the lumber was (the Milwaukee) not to take the cars onto its (the Rock Island) line. In respect to this notice, it is appellee's position that one Tittmore was the agent of the Milwaukee Company at Des Moines, and that arrangements were made with him that the cars, when they reached Des Moines, could be used to carry the lumber on the Rock Island road to its destination. A reading of the record in this respect justifies this conclusion: that this arrangement or talk was no part of the contract of shipment from Minneapolis to Des Moines, but that such shipment was entirely independent of any agreement for cars beyond Des Moines. It seems that, in a talk with Tittmore about the shipments to Des Moines, he said the cars could be used on the Rock Island line. To sustain the order of the district court, appellee relies on the following provisions of the law (Code, section 1292), which is as follows: "Any railway corporation, operating a railway in this state, intersecting or crossing any other line of railway, of the same gauge, operated by any other company, shall, by means of a Y, or other suitable and proper means, be made to connect with such other railway so intersected or crossed; and railway companies where railroads shall be so connected shall draw over their respective roads the cars of such connecting railway; and also those of any other railway or railways connected with said roads made to connect as aforesaid, and also the cars of all transportation companies or persons, at reasonable terms, and for a compensation not exceeding their ordinary rates." The following is section 10, chapter 77, Acts Seventeenth General Assembly, being section 2039 of McClain's Annotated Code: "It shall

be the duty of any railroad corporation, when within their power to do so, and upon reasonable notice, to furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and to receive and transport such freight with all reasonable dispatch, and to provide and keep suitable facilities for the receiving and handling the same at any depot on the line of its road; and also to receive and transport in like manner, the empty or loaded cars, furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged or reloaded and returned to the road so connecting; and for compensation, it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad, for a similar service." It may be said, as to section 1292, that in *Smith v. Railway Co.*, 86 Iowa, 202 (53 N. W. Rep. 128), it was held to have been repealed by implication, so far as concerns the obligation of companies to make connections, by chapter 24, Acts Twentieth General Assembly; and it is now contended by appellant that the entire section has been repealed by subsequent legislation,—not in terms, but in effect. That question we need not determine.

It is said by appellant, that the Rock Island road had no connection with either the Milwaukee road or the Des Moines, Northern & Western. By this is meant the connection contemplated by section 1292; but, if we treat the terminal system at Des Moines, as coming within the provisions of the section, so that roads connected thereby are within its operation, we may then inquire whether the facts of this case justify the order made by the district court. The order is as follows: "It is ordered and adjudged that, upon the filing of a bond by plaintiff in the sum of \$500, a writ of injunction issue herein, as prayed in plaintiff's said application, with sureties to be approved by the clerk

of this court, directing and commanding the defendant, the Chicago, Rock Island & Pacific Railway Company, its officers and agents, to receive and transfer the two cars, and the lumber loaded thereon and therein, tendered by plaintiff, the Green Bay Lumber Company, over the railway of defendant, to the stations, respectively, on its railway in Iowa, set out in said application of plaintiff, and to receive and transport all such other and further cars, and lumber loaded thereon, as may be loaded with lumber of plaintiff, and under its direction and control, that plaintiff may hereafter tender for shipment over defendant's line of road, located in the state of Iowa, upon the payment or tender by plaintiff to defendant of such reasonable and proper charges for such freighting as defendant is by law entitled to demand and receive, to all of which the defendant excepts." It will be seen, that the order is not alone as to the two cars, but it applies to all cars loaded with lumber of plaintiff, and under its direction and control. We may properly assume that the court intended by the words "direction and control," as to cars in the future, only such direction and control as the company had of the cars in question; for, unless so restricted, the adjudication would reach facts and conditions not embraced in the record, nor contemplated by the court, and it could hardly be contended that such direction and control might not exist under conditions where the order should not apply. Independent of the arrangement with Tittmore that the cars of the Milwaukee Company could be used on the Rock Island line, it does not seem to us that plaintiff has a semblance of legal right to the order made, in view of the notice, by the Milwaukee Company to the Rock Island Company, not to use its cars. Without that arrangement, when the cars reached the yards in Des Moines they must have been unloaded, and we suppose no one would claim

that plaintiff had a right to tender such cars to another road. It is to be conclusively said that plaintiff had no such right. Under that state of facts, plaintiff would have no "direction and control" of the cars, so as to come within the letter or spirit of the order. The validity of the order, then, must depend largely, if not entirely, on the effect of the arrangement with Tittmore; that is, whether that arrangement would operate to bind the Rock Island Company, so that it must take such cars when tendered, against the objection of the owners. The substance of the arrangement with Tittmore is stated in the evidence of W. O. Finkbine, vice president of and acting for the plaintiff company, as follows: "Q. Will you state to the court what arrangement, if any, was made at the time this lumber was shipped in the Milwaukee & St. Paul cars, and what knowledge they had of the ultimate destination of the lumber that was shipped in their cars? A. We had a talk with Mr. Tittmore, the general freight and passenger agent of the Des Moines, Northern & Western. We wished to ship some cars in here whose ultimate destination would be points on the Rock Island, and asked if we could have the use of these cars, and he consented to that; so he knew, before the shipment was made, that the ultimate destination of the cars was not for Des Moines, but our different yards on the Rock Island road." It appears elsewhere in the evidence that Tittmore also acted for the Milwaukee Company. It does not appear in the record that the Rock Island Company, when it refused to take the cars, knew of such arrangement by the plaintiff for their use. On the other hand, it clearly appears that the Milwaukee Company had previously notified the Rock Island Company that the two cars were not to go on the Rock Island line, and that the lumber must be transferred to other cars. The situation of

the Rock Island Company, when the two cars were tendered by the plaintiff, was this: It knew the shipment over the Milwaukee and its connecting line was at an end; that, if it took the cars or lumber, it must be on a new contract of shipment. It had no notice of any agreement by which the Milwaukee cars were to be used for shipment on its line, and it had express direction not to take such cars. Nothing in the law relied on placed an obligation on the company to take the cars under such a state of facts. The conditions are out of the usual order of shipments, exceptional, and not such as were intended to be governed by the acts of the legislature.

It is said that when the company first refused to take the cars it was for different reasons, as that it did not want to do business with the Milwaukee Company, and it clearly appears that it assigned as a reason that it wanted to use its own cars for the work, and not the cars of another company. But these facts do not change its right to plead and rely on any legal excuse it had for not taking the cars, in a suit to compel it to do so. The case presents the question of the legal obligation of the company to take such cars on its line, and not the question of whether it gave valid reasons for refusing to do so when the cars were offered. It is not, as in a case of objections to proofs of loss, under a policy of insurance, where objections not urged or made may be deemed waived; for in such cases the relations are contractual, and the company seeks to avoid an obligation because of a failure to do what the contract required. In this case, the defendant company is not seeking to avoid an obligation because of a failure of the plaintiff to do what was necessary to fix the obligation on the part of defendant. It is a case in which the defendant says, in effect, there is no such obligation, and no observance of conditions by the plaintiff could create such a one, and hence there

is nothing to waive. It could not reasonably be said that it was the duty of the defendant to know or inquire into the contractual relations between plaintiff and the Milwaukee Company. So far as it could assume such relations, under the disclosures of the record, it would be that all such relations were at an end because of the limited character of the shipment, and the notice it had received. We are not in doubt, as to the two cars which constitute the basis of the action, that there was no obligation on the part of the defendant to receive and haul them on its line. This being true, there is no support for the order as to future shipments. Until the company has refused to do what the law directs, it cannot be made liable to a judgment or mandatory order for performance in the future.

We have considered this case on an assumption of facts and law largely as claimed by appellee; that is, we have treated the talk with Tittamore, as to the use of the cars, as an agreement, so that plaintiff had the right to use the cars. We have also assumed, for the purposes of the case, inferentially, if not directly, that, if the shipment of the lumber had been a through one from Minneapolis to the point of destination, the defendant company would have been under obligation to accept and haul the cars. This assumption was merely to better understand the particular question on which we have determined the case, and it should be understood that we in no manner construe the acts or parts of acts quoted or referred to as fixing obligations to haul cars when tendered in strict accord with the spirit of the acts. Such questions are of great importance, and should not be affected, inferentially, by the discussion of other questions. The judgment of the district court is REVERSED.

THE CLIFTON COAL COMPANY V. THE SCOTTISH UNION &
NATIONAL INSURANCE COMPANY OF EDINBURGH,
Appellant.

Insurance: INCUMBRANCE CLAUSE. A mortgage drawn, but never
1 delivered to or for the mortgagee, is not an incumbrance, within
a provision avoiding a fire policy in case the property is incum-
bered by a mortgage.

SALE OF PROPERTY: *Subsequent consent of insurer.* A transfer of
2 the property insured, subject to the consent of the insurer, does
not avoid the policy, where such consent is given on the same
day by indorsement on the policy, which is then assigned to the
transferee.

VACANCY CLAUSE At the time a policy on an elevator building,
3 with tools and machinery, was issued, the elevator was not in use
for hoisting purposes (the insurer being informed that it would
not be so used again), but was then, and at the time of the fire,
used as a storehouse for the tools and machinery, preparatory to
their removal to a new plant. *Held*, that the elevator was not
vacant or unoccupied, within a clause of forfeiture in case it
should so become and remain for ten days.

INCREASE OF HAZARD. The removal of an engine from the building,
4 during the continuance of the policy did not increase the risk.

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

WEDNESDAY, MAY 19, 1897.

ACTION at law on a policy of insurance to recover
for a loss alleged to have been covered by it. There
was a trial by the court without a jury, and a judg-
ment for the plaintiff. The defendant appeals.—
Affirmed.

Barcroft & McCaughan for appellant.

Bishop, Bowen & Fleming for appellee.

ROBINSON, J.—On the thirteenth day of April, 1894, the defendant issued to the Coon Valley Fuel Company the policy in suit. It insured the fuel company against loss or damage by fire to the amount of one thousand dollars on a certain elevator building, engine, and fixtures, and other machinery, appurtenances, and property of various kinds then owned by the insured, and situated on a tract of land described, in Polk county. In May, 1894, the fuel company sold the property insured to the plaintiff, and assigned to it the policy of insurance. The defendant was notified of the sale, and consented to the transfer, by an indorsement in writing made on the policy. In the latter part of the same month, nearly all of the property covered by the policy was destroyed by fire, and this action is brought to recover the amount of the policy. The defendant pleaded several defenses, but the district court rendered judgment in favor of the plaintiff for the amount of its loss.

I. The policy provides that it shall be void "if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein, * * * or if the subject of the insurance be personal property, and be or become incumbered by a chattel mortgage." The defendant contends that the policy was void under these provisions, for the reason that the fuel company represented to the defendant that the property covered by the policy was unincumbered at the time the policy was issued, when the truth was the property was then incumbered by a chattel mortgage, the existence of which was concealed from the defendant. It appears that a mortgage on the insured property had in fact been drawn, but it is shown beyond question that it

was never delivered to or for the mortgagees, and that it never became effectual. It was not, therefore, a mortgage or other incumbrance, within the meaning of the policy, and did not in any manner affect the title to the property insured.

II. It is claimed that the policy became void by the transfer of the property, and also a transfer of the policy; that the transfer of the property was made before the policy was transferred, in consequence of which the policy became void; and that the consent of the defendant to its transfer did not revive it. The reasoning of the appellant on this point is hardly satisfactory. The petition alleges that the interest of the fuel company in the property insured was assigned to the plaintiff, subject to the consent of the defendant, and that on the same day such consent was given. The answer does not deny these allegations, and admits that the policy was assigned to the plaintiff, with the consent of the defendant. There could have been but one purpose in the assignment of the policy, and the consent of the defendant thereto, which was to continue the policy in force for the benefit of the plaintiff, and that was done

III. The policy provides that it shall be void "if the building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and remain so ten days." The appellant contends that the elevator was vacant after the policy was issued, and before the fire, for more than ten days, within the meaning of that provision. The facts in regard to this matter seem to be as follows: When the policy was issued, the elevator was not in use for hoisting coal, and had not been so used for nearly a year. The fuel company was preparing a new shaft and plant, and in August or September, 1893, had moved the top works of the old plant to the new one. After the policy was issued,

the engine was removed from the elevator insured, but other property covered by the policy remained therein. While the policy was in force the elevator was used as a place in which to store machinery, tools, ropes, and various other articles. That was the use which was being made of the elevator when the policy was issued, and there was testimony which tends to show that the defendant was fully informed at that time with respect to the condition and use of the elevator, and that it would not be used again for hoisting coal. The removal of the engine did not
 4 change the character of the risk. The evidence was ample to authorize the district court to find that the elevator was not at any time vacant, within the meaning of the policy. *Woodruff v. Insurance Co.*, 83 N. Y. 134; *Short v. Insurance Co.*, 90 N. Y. 16; *Devine v. Insurance Co.*, 32 Wis. 471. We find no reason for disturbing the judgment of the district court, and it is **AFFIRMED**.

V. HOUDECK AND KATIE PAULICEK V. THE MERCHANTS
 AND BANKERS INSURANCE COMPANY, Appellant.

109	308
106	334

102	303
136	150

Corporations: BY-LAW AND INSURANCE POLICY. A condition in a
 1 policy which provides for a forfeiture if insured place an incum-
 2 brance without the written consent of the insurer, is enforceable,
 notwithstanding that the insurer had a by-law when the policy
 issued which by-law made the policy void if an incumbrance,
 without consent, reduced the interest of the assured to less than
 the amount of the insurance.

BY-LAW: Authority to make. Under McClain's Code, section 1692,
 3 which gives to directors of an insurance company the right to
 establish by-laws not inconsistent with its charter, directors of an
 insurance company may adopt by-laws, though no authority to
 make by-laws is given them in the articles of incorporation.

Insurance: WAIVER BY ACCEPTANCE OF PREMIUM. That an insur-
 7 ance company accepted an assessment paid by a policy holder on
 a guaranty note executed for his premium was not a waiver of
 a breach of a condition of the policy, unless the company had

knowledge thereof at the time it accepted it; neither was it a waiver to retain such assessment, and under the evidence, waiver was a jury question.

Repeal. A mere disregard of a by-law of an insurance company by its officers is not sufficient to show its repeal.

Settlement and Compromise: EVIDENCE. Where an agreement recites that it was an agreement of settlement and compromise of a disputed claim, it is inadmissible in an action on such claim.

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

WEDNESDAY, MAY 19, 1897.

ACTION at law upon a policy of insurance issued to V. Houdeck; loss, if any, made payable to Paulicek as her interest may appear at time of loss. Defense, a breach of condition against incumbrances. Trial to a jury, directed verdict for plaintiffs, and defendant appeals.—*Reversed.*

C. E. Campbell and Whipple & Zollinger for appellant.

J. J. Mosnat for appellees.

DEEMER, J.—The issuance of the policy, the destruction of the property insured by fire, and the performance of all the conditions precedent to plaintiffs' right to recover, are admitted. It is also admitted that after the execution of the policy the assured placed two mortgages upon the property, for the sums of three hundred dollars and four hundred and sixty-five dollars, respectively. Appellant had no notice of the giving of these instruments, and did not consent to the execution thereof. The policy contained this, among other provisions: "This contract shall be void and of no effect, unless consent in writing is indorsed hereon by the president

or secretary of the company, * * * if interest of the assured is now, or shall hereafter be, incumbered by any mortgage or lien of any kind. * * *” The defendant pleaded a breach of this condition as a defense to the action. To meet this defense, plaintiffs relied upon (1) a by-law of the company which they claimed modified the terms of the policy, and permitted mortgaging of the property; (2) recognition of the validity of the policy, and negotiations for a settlement, after appellant had notice of the making of the mortgages; and (3) receipt by the company of a part of the premium after the fire, and after knowledge of the alleged breach of condition.

The by-law upon which appellees rely was adopted by the defendant's board of directors, and is as follows: “In all cases of application for insurance, the applicant shall state the true value of the property
2 insured, and also the amount of incumbrance on the same: and should there afterwards, during the life of the policy, be any incumbrance on the property insured, so as to reduce the real interest of the party insured to a sum less than the amount of insurance, and the assured shall neglect to
3 obtain the consent of the company thereto, then said policy shall be void.” Appellant says that this by-law is of no validity because the board of directors was given no authority in the articles of incorporation to adopt by-laws; and it cites the familiar rule that, unless the articles of incorporation specifically delegate to the board the power to enact by-laws, such power must remain in, and can only be exercised by, the members of the corporation, as declared in *Beach, Corp.*, section 31, and *Angell & Ames, Corp.*, section 327, and cases cited. The answer to this contention is the statute (*McClain's Code*, section 1692), which gives to directors of insurance companies organized under chapter 4 of title 9 of the

Code, relating to insurance companies, whether doing business under the ordinary or mutual plan, the right to ordain and establish such by-laws and regulations, not inconsistent with the charter or with the constitution and laws of the United States or of this state, as shall appear to them necessary for regulating and conducting the business of the company.

Appellant further contends that this by-law had been abrogated and repealed before the issuance of the policy in suit. There is no evidence of any direct action of the corporation repealing it, but it is claimed that the course of business of the company was such that its abrogation should be inferred. As a general rule, a by-law can only be repealed by the authority which made it, and it cannot be affected by usage contrary thereto. True, the company may, in certain cases, be estopped from setting up a by-law in defense, when all the members have assented to its abrogation.

But the mere fact that the officers of a mutual
4 company have disregarded a by-law is not sufficient to show its repeal. Niblack, Ben. Soc. & Acc. Ins. (1st Ed.), section 16; Boone, Corp., section 56; Beach, Priv. Corp., section 323. The parties may, in their contract, mutually agree to a waiver of a by-law. It is held by a number of authorities that, if the policy is inconsistent with the by-law, the latter is deemed to be waived. *Davidson v. Society*, 39 Minn. 303 (39 N. W. Rep. 803); *Doane v. Insurance Co.*, 45 N. J. Eq. 274 (17 Atl. Rep. 625); *Philbrook v. Insurance Co.*, 37 Me. 137; *Insurance Co. v. Rand*, 24 N. H. 428. Without approving this doctrine, it is sufficient to say that there is nothing in the articles of incorporation, so far as shown, prohibiting the agents of the company from making a contract with the conditions appearing in the policy in suit; and it must be presumed that, when the parties agreed to this condition, they did so with express

knowledge of the by-law, and for the purpose of adding to the duties assumed by the assured,—that is, of securing the consent in writing of the president or secretary to the mortgaging of the property, no matter what the amount of the mortgage. The by-law does not require the company to pay if the real interest of the assured, after deducting the added incumbrance, is equal to or more than the amount of the insurance; hence the clause in the policy is not in conflict with the by-law. And as we have said, there is nothing in the by-law or in the articles of incorporation proscribing the making of such a contract.

Appellees contend, however, that the condition was waived by the appellant, by recognizing the policy, and offering to pay the amount of the loss thereunder,
5 after notice of the breach. The fire occurred on July 14, 1894. On August 1, appellant sent an adjuster to examine into the loss. Appellees gave notice and made proofs of loss on August 31. Some time prior to the fifth day of February, 1895, this suit was commenced. After the commencement of the action, defendant requested appellee Houdeck to go to Des Moines for the purpose of making a settlement or compromise. In response to this, Houdeck went to Des Moines, and had a conference with the vice-president of the company. At this conference an agreement of settlement and compromise was entered into, by which Houdeck, Paulicek, and Lahn (one of the subsequent mortgagees), agreed to accept one hundred dollars in full of all claims. This paper was signed by Houdeck alone, and he agreed to get the signatures of the other parties. These others refused to sign, and the agreement was never consummated. Appellees say that this amounted to a recognition of the policy after notice of a breach of condition, and a waiver thereof; while appellant contends that the

evidence was, and is inadmissible, and of no value, for the reason that it was an attempt at settlement and compromise. There is no evidence to the effect that Houdeck or his co-plaintiff was put to any expense in the matter of this attempted compromise, and the agreement itself recites that it was an agreement of settlement and compromise of a disputed claim. It is uniformly held, that an offer of compromise is inadmissible. *Home Insurance Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *May, Ins.*, 294g; *Greenleaf, Ev.*, section 192; *Richards v. Insurance Co.* (Mich.) 47 N. W. Rep. 350; *Horton, Ins.*, section 1090. The agreement contained in this offer of settlement has in it no statement or admission of fact in recognition of the validity of the policy which can be divorced from the offer, and made the foundation of a waiver. It seems to us, that there was no waiver of the breach of the condition of the policy in this offer to compromise. A jury might have found that appellant was at the time denying all liability, and made the offer, not in recognition of the validity of the policy, but for the purpose of buying its peace.

It is also insisted that the appellant waived the breach of condition for the reason that after the loss, and after knowledge of the breach, it received, accepted, and retained an assessment paid by appellee upon a guaranty note executed by him for his premium. That it did accept and retain such assessment is conceded, but it was for an assessment due at the time the payment was made, and liability for it accrued during the life of the policy. It had the right to the money, and did not waive the breach of condition unless it had knowledge thereof at the time it accepted it. There is no evidence whatever to the effect that it had any knowledge of the existence of these subsequent mortgages at the time it

accepted the amount of the assessment. It did not waive the breach, then, by accepting the money. Nor do we think it waived it by retaining the same, for it was under no obligation to return the premium paid before knowledge of the forfeiture. *Harle v. Insurance Co.*, 71 Iowa, 401 (32 N. W. Rep. 396); *Harris v. Insurance Co.*, 53 Iowa, 236 (5 N. W. Rep. 124); May, Ins., 506. Taking the most favorable view of the evidence as to waiver, it was a question for the jury, and not for the court, to determine whether the appellant, after notice of the breach of condition, did any act indicating an intention not to rely thereon. For the errors pointed out, the judgment is REVERSED.

M. D. CORD, Appellant, v. JOHN BARRY.

Appeal: CONFLICTS IN ABSTRACTS: *Duty to furnish transcript.*
Where there is an issue as to the sufficiency of the abstract, the burden is upon the appellant to provide a transcript of the record, and for failure to do so the appeal must be dismissed.

Appeal from Woodbury District Court.—HON. G. W. WAKEFIELD, Judge.

WEDNESDAY, MAY 19, 1897.

ACTION at law to recover the value of seven hundred and sixty bushels of corn, alleged to be due, under a written lease, on account of rent for the year 1894, and for a landlord's attachment. The defendant answered, admitting the execution of the lease, and alleging a subsequent oral agreement by which the amount of rent corn and the time of delivery were changed, and that he has fully performed said oral agreement. He also alleges, by way of counter-claim, that the attachment was wrongfully sued out, and asks damages. Verdict and judgment were rendered for the defendant in the sum of one hundred and

fifty-three dollars and thirty-five cents. Plaintiff appeals.—*Dismissed.*

Jepson & Jepson and *Marks & Mould* for appellant.

Marsh & Henderson for appellee.

GIVEN, J.—Appellant's abstract was served February 7, and filed February 10, 1894, wherein he says: "And this abstract contains all of the evidence produced, offered, and introduced upon the trial of this case, the objections thereto and the rulings thereon, and all exceptions taken, all of the instructions of the court, and the instructions asked by the plaintiff, and is a complete and true abstract of the record therein." February 22, 1896, appellee filed an amendment to the abstract, wherein he denies that said abstract and amendment contain "all the record, or all the pleadings, or all the evidence offered or introduced on the trial." February 25, 1896, the appellant filed an amendment to his abstract, wherein he states as follows: "And the original abstract of the appellant herein filed, together with the appellee's amendment thereto, and this amendment of appellant's abstract, contains all of the evidence produced, offered, and introduced on the trial of this cause; all of the objections thereto, and the rulings on such objections, and the exceptions taken thereto; all of the instructions asked for by the plaintiff, and the rulings of the court thereon, and plaintiff's exceptions to such rulings; all of the instructions given by the court, and all of the exceptions taken thereto,—and is a true abstract of all of the evidence, pleadings, and of all of the record in said cause." This amendment does not set out any part of the record. Appellant further states that a transcript of the evidence is on file in the office of the clerk of the district court, and "invites the appellee to

file the said transcript in this court, and the supreme court is respectfully asked to order the same filed, if deemed necessary or expedient in determining the question in this case presented and involved." Here we have a direct issue as to the sufficiency of the abstract; the appellant affirming and the appellee denying. In such case the dispute can only be determined by reference to the transcript. Appellant seems to think that it is the duty of the appellee to file the transcript, or of the court to order it to be filed, but such is not the practice. The burden is upon the appellant, in case of such a denial, to sustain what he has affirmed, by a production of the transcript; and, as he has not done this, we are as if no record whatever was before us. See *Lookabill v. Foulks*, 83 Iowa, 423; *Chapin v. Garretson*, 85 Iowa, 377, and *Griffith v. Harvester Co.*, 92 Iowa, 635. With this condition of the record, the appeal must be DISMISSED.

C. T. FITTS & COMPANY v. HENRY REINHART, Appellant.

Contract: PERFORMANCE MADE IMPOSSIBLE. A provision in a building contract that a certificate shall be obtained from the architect for all the payments, does not require the contractor to procure such certificate where the architect has been discharged by the owner.

WAIVER OF PERFORMANCE. An owner who has without objection permitted a contractor for the construction of a steam-heating plant to make side connection for such plant instead of top connection as provided by the contract, is not entitled to a deduction from the contract price, of the amount which it would cost to change the connection from side to top.

Damages: EVIDENCE OF AMOUNT ESSENTIAL. Though defendant was put to expense in necessary changes because the plaintiff did not complete a building contract in accordance with its terms, if the evidence fails to show the amount of such expense, there can be no recovery on a counter-claim.

Appeal from Woodbury District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, MAY 19, 1897.

ACTION to foreclose a mechanic's lien. Judgment and decree for the plaintiff, and defendant appeals.—*Modified and affirmed.*

Milchrist & Robinson and Lynn & Foley for appellant.

Marks & Mould for appellees.

LADD, J.—The plaintiff entered into a written contract with the defendant to furnish labor and material necessary for the construction of a steam-heating plant in the Reinhart Flats, in Sioux City, according to certain plans and specifications. The contract provides: "All work to be done under the supervision and to the satisfaction of said architect (acting as said owner's agent). * * * The last and final payment to be made within ten days after
1 all work is completed, * * * provided that for all payments a certificate shall be obtained from and signed by said architect." No certificate was furnished, and the defendant claims that, for this reason, the action cannot be maintained. He relies on *McNamara v. Harrison*, 81 Iowa 486 (46 N. W. Rep. 976), where it is held that parties may bind themselves to make payment on the certificate or estimate of some third person, such as an engineer or architect; and unless there be some good reason why it is not furnished, no action can be maintained. The evidence in this case furnishes a very good excuse for not obtaining the required certificate. Before the plant was completed, the defendant dispensed with

the services of his architect, and directed his engineer to see that it was put in right. By the terms of the contract, the architect was to act as his agent in superintending the work, and in making the certificates upon which payments might be made. Certainly, after his discharge, the defendant would not be bound by anything he might do. If so, then the plaintiff was relieved from the conditions of the contract requiring the approval of this architect and his certificate before payment.

II. The contract required the plaintiff to furnish a steam-heating and power plant, in strict accordance with the plans and specifications. This was not done. That some of the work performed and materials furnished were as expensive as that agreed does not always answer the objection to a failure to comply with the terms of the contract. One main and some of the pipes were too small. Many valves required were omitted, and the ceiling plates were not as agreed. The tank was necessarily smaller than

2 called for, but a proper discount was allowed on this. The evidence, however, fails to show the

cost of procuring and placing larger pipes and main, necessary valves, and changing the ceiling plates. True, estimates were given of the cost of making the plant comply with the contract, but these were on the basis of so changing the system as to connect all pipes with the mains from the top, instead of the side. The defendant, at considerable cost, had it so changed, and some other defects remedied. Much evidence was introduced on the question as to whether a top or a side connection is preferable. We need not deter-

mine, if we could, which method is best. The

3 defendant made no objection to the side connection, nor did his architect or engineer, until the work was done and all pipes laid. Had he desired the other method, he should have so indicated in time

to enable plaintiff to comply with his wishes. That adopted is approved by many experts, and believed by the plaintiff to be preferable. As the cost of making such changes and furnishing such material as defendant was entitled to is not shown, damages cannot be allowed on the counter-claim.

III. An engine was purchased at the agreed price of three hundred and seventy-five dollars, and afterwards a larger one ordered. The defendant claims the last one was not to exceed in cost the sum of fifty dollars more than that first bought, while the plaintiff says he was to receive the market price. The evidence is conflicting, but we think the circumstances sustain the contention of the defendant. It is insisted the engine was guaranteed to do the work for which it was purchased, and failed to do so. This need not be considered, as the damages occasioned by such failure have not been proven. *Threshing Machine Co. v. Haven*, 65 Iowa, 359 (21 N. W. Rep. 677).

IV. There are other items set out in the petition for which recovery is claimed, but no evidence was introduced tending to show that its articles were ever sold or delivered to the defendant. The contract price for the plant was four thousand, five hundred and sixty-five dollars, and the price allowed for the engine four hundred and twenty-five dollars. From these must be deducted the two thousand five hundred dollars paid, and the sixty dollar reduction on the tank, leaving the sum of two thousand four hundred and thirty dollars owing plaintiff, with interest at six per cent. per annum from February 23, 1893. What has been said indicates that the costs on the counter-claim were properly taxed to the defendant by the district court. The costs in this court will be taxed to the plaintiff.—MODIFIED AND AFFIRMED.

THE FARMERS SAVINGS BANK OF GEORGE, Appellant, v.
WILLIAM WILKA.

102	315
118	345
102	315
d114	51
102	315
f130	387

Indorsement in Blank: PAROL VARIANCE. Where a note provides
1 that indorsers waive presentment, protest, and notice of non-
payment, one transferring it by blank indorsement cannot show
by parol that his indorsement was simply to transfer title, even,
as against a holder who knew of such verbal agreement.

102	315
132	7

Appeal: ASSIGNMENT OF ERRORS. An assignment of error in giving
2 a specified part of an instruction is sufficient without stating in
what respect it was claimed to be erroneous.

Appeal from Lyon District Court.—HON. SCOTT M. LADD,
Judge.

THURSDAY, MAY 20, 1897.

ACTION at law to recover the amount due on a promissory note. The action was commenced in justice's court against the makers of the note, and William Wilka as indorser. Judgment was rendered in that court against the defendants, and Wilka appealed therefrom to the district court. A trial by jury, had in that court, resulted in a verdict for Wilka. From a judgment rendered in his favor for costs, the plaintiff appeals.—*Reversed.*

J. M. Parsons for appellant.

E. C. Roach for appellee.

ROBINSON, J.—The note in suit was dated the twenty-fifth day of March, 1891, is for the sum of one hundred and twenty-five dollars, with interest
1 thereon at the rate of eight per cent. per annum, and was made payable to Wilka. It contained a provision giving any justice of the peace

before whom suit might be brought, jurisdiction of it, and also the following: "The drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and non-payment of this note, and suit against the maker." The note was transferred to the plaintiff by a blank indorsement made by Wilka. He filed an answer in the district court, in which he alleged that when he indorsed the note to the plaintiff it was orally agreed between them that the defendant should not be liable on the note, that his indorsement was merely for the purpose of transferring the note, and that the plaintiff should look to the makers of the note alone for payment.

I. The appellee has filed a motion to strike from the record the appellant's assignment of errors on the ground that it is too indefinite to conform to the statute. The only point urged by the appellant is

2 that the effect of the blank indorsement of such a note as that in suit cannot be defeated by proving a contemporaneous verbal agreement that the indorser should not be liable on the note by reason of the indorsement. We need to consider but one of the errors assigned, and that is as follows: "The court erred in giving the first division of paragraph 2 of its instructions to the jury." The paragraph specified was duly excepted to at the time it was given. The first paragraph thereof is as follows: "It appears from the evidence that the defendant, Wilka, sold and transferred the note in controversy to the plaintiff, and wrote his name across the back of said note. Now, if you find from the evidence before you that at the time Wilka wrote his name on the back of the note, and transferred same to the plaintiff, it was agreed between Wilka and the plaintiff that he should so do for the purpose of transferring the note to plaintiff, and that plaintiff would not hold him liable on said note, but would look to the signers of said note

alone for payment thereof, or substantially so agreed, then you will find for the defendant." The assignment designated the particular part of the charge which was claimed to be erroneous, and was sufficient, under numerous decisions of this court. It was not necessary to state in what respect the paragraph was claimed to be erroneous. *Sherwood v. Snow*, 46 Iowa, 482; *Wood v. Whitton*, 66 Iowa, 300 (19 N. W. Rep. 907, and 23 N. W. Rep. 675); *Hammer v. Railway Co.*, 70 Iowa, 624 (25 N. W. Rep. 246); *Hathaway v. Insurance Co.*, 64 Iowa, 231 (20 N. W. Rep. 164); *Clark v. Ralls*, 50 Iowa, 279; *Schaefer v. Railway Co.*, 62 Iowa, 629 (17 N. W. Rep. 893). The appellee relies upon a paragraph contained in *Koenigs v. Railroad Co.*, 98 Iowa, 569 (65 N. W. Rep. 315), as announcing a different rule, but the paragraph was stated to be the view of the writer of the opinion only, and nothing decided by the opinion is in conflict with the conclusions we reach, nor with the rule of practice heretofore approved by this court. Applying that rule to the assignment in question, we must hold it to be sufficient.

II. In the case of *Bank v. Sigstad*, 96 Iowa, 491 (65 N. W. Rep. 407), we considered the effect of the blank indorsement of a promissory note made by the payee thereof. The note contained the following provision: "The makers, indorsers, and guarantors of this note * * * hereby waive presentment of payment, notice of non-payment, protest, and notice of protest, and due diligence in bringing suit against any party thereto." We held that the defendant Bangs, who was the payee of the note, by his blank indorsement, became absolutely liable for the payment of the note in case the makers did not pay it, and that he could not show, as against the indorsee, nor against any holder of the note, even though he had taken it with knowledge of the facts, that when the indorsement

was made it was verbally agreed between himself and the indorsee that he should not be bound by the indorsement. The provision of the note upon which that decision depended was, so far as it relates to the question we are now required to determine, the same, in legal effect, as that contained in the note in suit which we have set out; and under the rule of that case the portion of the charge given to the jury in this case which we have quoted was erroneous. Neither of the cases of *Truman v. Bishop*, 83 Iowa, 697 (50 N. W. Rep. 278), and *Harrison v. McKim*, 18 Iowa, 485, relied upon by the appellee, involved a note which contained a provision in any respect like that which was controlling in the case of *Bank v. Sigstad, supra*, and in this case, and the contracts of the indorsers were therefore not fully expressed by the indorsements in blank. For the error in the charge pointed out, the judgment of the district court is REVERSED.

CARRIE BRIGGS v. L. L. BRIGGS, Appellant.

DIVORCE: CRUEL TREATMENT. A charge of cruelty, in that defendant

- 1 had an abortion produced on plaintiff, is not supported in an action for maintenance, by plaintiff's testimony as to her sickness, opinions of physicians that it might have resulted from abortion, though it might have been otherwise caused, where it appears that plaintiff's menses were regular at the time of the alleged abortion; that she frequently stated thereafter that she had not miscarried; and did not claim to have discovered the alleged abortion until after bringing the action,—four years later; and where a witness contradicted plaintiff as to occurrences on that day; and defendant and the physician alleged to have produced the abortion denied all knowledge of it.

DESERTION. Failure of a husband to protest against the action of his

- 2 wife in leaving him with a statement that she is going on a visit, will not entitle the wife to a divorce against him on the ground of desertion, although he believed she was deserting him when she made such statement.

Appeal from Chickasaw District Court.—HON. A. N. HOBSON, Judge.

THURSDAY, MAY 20, 1897.

ACTION by plaintiff for alimony and separate maintenance, and by defendant, in his cross-petition, for a divorce. Decree was entered ordering the defendant to pay plaintiff six hundred and forty dollars, and two hundred and forty dollars annually for maintenance, and an attorney's fee of two hundred dollars, and dismissing the cross-petition. Defendant appeals. Later, plaintiff appealed.—*Reversed*.

Springer & Clary for appellant.

L. Bullis and J. H. Powers for appellee.

LADD, J.—The plaintiff and defendant were married June 13, 1888. At that time the plaintiff was about twenty-six years old, and the defendant thirty. They lived happily together until May 29, 1889, when plaintiff became sick, and has never recovered. She was under the care of local physicians until the latter part of September, when she was taken to the Woman's Hospital in Chicago for treatment by a specialist. She returned to her home in April following, and remained there till March 4, 1891, when she left defendant, and has since resided with her sister, in Minnesota. In February, 1893, she began this action, basing her claim for alimony and separate maintenance on three grounds: (1) Habitual drunkenness, (2) cruel and inhuman treatment, (3) desertion. The first ground has been abandoned, but the others are insisted on. The defendant, in a cross-petition, asks for a divorce on the ground of desertion.

I. Has the defendant so inhumanely treated his wife as to endanger her life? She now claims that her sickness was occasioned by an abortion produced by Dr. Babcock, with the consent and procurement of the defendant. To sustain this accusation, she relies on the testimony of the woman and her daughter who washed her bedding at the time, and say that it was as bloody as when a miscarriage has taken place; upon her own graphic account of her sickness and suffering; and upon the opinions of physicians that her ailments may have resulted from an abortion. On the other hand, it appears that her menses were regular and uninterrupted, and that she repeatedly stated during the summer that she did not have a miscarriage. Dr. Babcock and defendant deny all knowledge of any abortion. Mrs. Babcock, who was at the house several times a day during this sickness, knew nothing of it. Belle Miller denies having witnessed the scenes described by plaintiff as having occurred in her presence. The physicians agree that her disease did not necessarily result from the cause alleged, and there is not a particle of evidence tending to show that defendant or Babcock ever did anything to occasion an abortion. The plaintiff did not make the discovery until four years had elapsed. She had left the defendant and begun this suit in the meantime. The charge is unfounded.

The claim is also made that proper medical aid was not furnished, and that defendant insisted on treatment by Babcock against the plaintiff's wishes. It was only natural that defendant prefer a relative, who was a next-door neighbor, as his family physician. The weight of the evidence, however, shows that no objection was made to him until her return from Chicago, and then, in deference to her wishes, Dr. Wight was called.

It is insisted that defendant treated his wife with indifference and neglect after her return from Chicago. He sent Dr. Babcock there to offer his assistance. on her return home. This she declined, and employed a nurse to accompany her, at considerable expense. Dr. Byford invited Dr. Babcock to be present at the final examination of plaintiff at the hospital, but she told him his presence was not desired. Under such circumstances the greetings of the defendant might not have been as cordial as they should when his wife returned. From this time on her mother took exclusive care of plaintiff. She was irritable, fault-finding, and hysterical, and found nothing in defendant, or what he did, to commend, and everything in his mother, sister, and uncle, as well as himself, to condemn. He undoubtedly relied too much on her mother's care, and failed to show his sick wife many of those attentions and courtesies which are so much in a woman's life. But her treatment of him and his relatives made this inevitable. She suspected him of trying to poison her, and it was only an unfounded suspicion. Her mother had come to be more to her than her husband, and when she left, both went together, voluntarily, and not in fear. Only a few of the many charges have been mentioned, but enough to show that the evidence fails to establish such inhuman treatment as is contemplated by the statute.

II. There is no evidence tending to support the charge of desertion alleged in the petition. The plaintiff admits she left defendant. All arrangements were made for a home in Minnesota before her
2 intended departure was disclosed to her husband. He furnished boxes for packing, and attended to the shipment of the goods. He paid expenses of transportation, but nothing more. He assisted her to the train, and accompanied her as far as Austin, Minn., where she was met by her

brother-in-law, in pursuance of an understanding had before her husband learned she expected to go away. He made no objections to the proposed visit, and no inquiry as to the date of her expected return. The only occurrence which might have led him to suspect her intentions was the shipment of all household goods belonging to her, and part of his own. Even if he did believe she was deserting him, he was not required, under the circumstances disclosed in this case, to protest against her action in so doing. The evidence clearly shows that plaintiff deserted her husband, and he is entitled to a decree of divorce on that ground. The motions filed are without merit, and require no consideration.—REVERSED.

OLE STENSON FURENES, STINE STENSON FURENES, *et al.*,
v. JOHN SEVERTSON, *et al.*, Appellants.

Wills: "MY HEIRS" CONSTRUED: *Alienage*. A devise of half of the

- 1 estate of a childless testator to his heirs and the other half to the heirs of his wife, passes the title to half such remainder to the
- 2 collateral heirs of testator, although they are all non-resident aliens, and the heirs of the wife are citizens, under Acts Twenty-second General Assembly, chapter 85, section 2, authorizing any non-resident alien to acquire and hold real property under specified conditions. The words "my heirs" are here used as a description and not to denote succession. It was not the intent of testator to exclude such of his "heirs" as were unable to take by descent, on account of alienage.

ALIEN: *Devise*. A non-resident alien may take by devise under Acts

- 2 Twenty-second General Assembly, chapter 85, section 1, prohibiting a non-resident from acquiring title to or taking any lands by devise or otherwise except as afterwards provided, and section 2, authorizing non-resident aliens to acquire and hold three hundred and twenty acres of land, if within five years from the date of purchase the same is placed in the actual possession of a relative within the third degree, and such relative becomes a naturalized citizen within ten years from the purchase.

102	322
104	663
109	322
108	508
102	322
109	512
102	322
111	44
111	45
102	322
133	222

Adjudication: PARTIES: Partition. A decree in partition is not
8 binding on parties interested in the land, who were not made parties thereto.

Appeal from Story District Court.—HON. S. M. WEAVER, Judge.

THURSDAY, MAY 20, 1897.

SUIT in equity to partition real estate. The lower court sustained a demurrer to the defendants' answer, and they appeal.—*Affirmed.*

M. P. Webb and Read & Read for appellants.

E. H. Addison, W. G. Harvison, and D. J. Vinje for appellees.

DEEMER, J.—Thor Olson and his wife, who were natives of Norway, although citizens of the United States, resided, prior to their death, in Story county.

Olson was seized of the lands which are the sub-
1 ject of controversy, and before his death executed a will, in which he devised his real estate to his wife for life, remainder over, one-half to his heirs and one-half to the heirs of his wife. The widow elected to accept the provisions of the will, and entered into the possession of the real estate, which she held until the date of her death, August 29, 1892. These parties had no children. The plaintiffs are the collateral heirs of Thor Olson, and are each and all non-resident aliens. The defendants are the collateral heirs of the wife, and they, or some of them, are residents and citizens of the United States. After the death of Olson and his wife, the defendants had the lands, of which their ancestors died seized, partitioned among themselves, but plaintiffs were not made parties to the suit. The contention of appellants under these facts is that plaintiffs cannot

inherit from Thor Olson on account of their alienage, because of the provisions of chapter 85, Acts Twenty-second General Assembly, and that, as they could not

inherit from him, they are not his heirs, and
2 therefore cannot take under the will. The act

of the general assembly referred to, so far as material, is as follows: Section 1: "Non-resident aliens

* * * are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise only as hereinafter provided. * * *"

Section 2: "Any non-resident alien may acquire and hold real property to the extent of 320 acres * * * provided that within five years from the date of purchase of said property the same is placed in the actual possession of a relative of such purchaser; the occupant being related to such owner within the third degree of kindred; * * *

and further provided that such occupant become a naturalized citizen within ten years from the purchase of said property as aforesaid." Now, in recognition of the familiar doctrine that one who takes by devise is a purchaser, we have held that a non-resident alien may take by devise under the exception contained in this statute. *Bennett v. Hibbert*, 88 Iowa, 154 (55 N. W. Rep. 93). So that the only question which remains on this branch of the case, is,

do the plaintiffs take by descent? The solution of this inquiry involves a construction of the words "my heirs," as used by Thor Olson in his will. The canons of construction with reference to such instruments are well understood, and the cardinal one is that the intention of the testator is the first great object of inquiry. Turning to the will, it is evident that the testator did not intend to devise all this real estate to the heirs of his wife. This he carefully guarded against by saying they should receive but one-half. And yet appellants say the will should be so construed as to give them all.

Another tenet is that a will must be read in such a way as to give effect to every portion of the instrument unless there arises some invincible repugnance, or unless some portion of it is absolutely unintelligible. The testator manifestly intended some class of persons by the use of the words "my heirs," and the persons so intended were other than the heirs of his wife. This is perfectly patent. Now, it is well known that persons unskilled in the law use the word "heirs" as descriptive of a class of persons who cannot, in fact, take as heirs. In recognition of this doctrine, the words "heirs at law" have been construed to mean adopted children, next of kin, heirs of a particular class or description, heirs presumptive, heirs apparent, heirs at the date of the will, heirs at the decease of the testator, or heirs at even a later date, the construction resting in each particular case upon an ascertainment of the testator's intention from the words used, from the context of the instrument, and from the surrounding circumstances. See *In re Swenson's Estate* (Minn.) 56 N. W. Rep. 1115, and cases cited; 2 Jarman, Wills (6th Am. Ed.), 905, *et seq.*; Schouler, Wills, sections 470, 533, 542. So in the case of *Collins v. Phillips*, 91 Iowa, 210 (59 N. W. Rep. 40), we held, in construing an instrument creating a trust, that the word "heir" should be held to mean "child." It is evident that the words "my heirs" were used in the will not to denote succession, but to describe the devisees, and they should not be given their strict legal meaning, for that was not the testator's intention. If these heirs had been specifically named, instead of designated by a general term, there would be no question of their right to take and hold the property subject to the conditions imposed by the statute. Finding, as we do, that the testator intended to include them under the general classification, the result must be the same. A third rule of construction is that, where

language is susceptible of two constructions, that interpretation is to be preferred which will render valid all the provisions of the will. And another is that a will should be so construed as to prevent even partial intestacy. Applying these rules to the facts above recited, and it is clear that the testator intended to devise one-half of his estate to those of his own blood, who would inherit it had there been no statute to prevent. Again, the very statutes upon which appellants rely, speak of alien heirs, and give color to the thought that such a term is a proper one, and descriptive of a particular class of persons. We need not refer to the great number of cases which tend to support our conclusions; for it has been frequently said cases are of little help, except as they lay down principles which aid in arriving at the true intent of the testator. We have no doubt whatever that the testator intended to devise one-half of the remainder of his estate to the plaintiffs, and his intent should be respected and enforced.

A further claim is made that the decree in partition is *res adjudicata*, and a bar to plaintiffs' recovery. The decree was rendered in a suit to which the defendants alone were parties. Surely, such
3 a decree is not binding upon the plaintiffs. They cannot be concluded without their day in court, and their property cannot be taken without due process of law; by which latter term is meant that the right of a person to his life, liberty, or property shall not be divested except by a judicial determination after due notice in pursuance of a general law. The case of *Stemple v. Herminghouser*, 3 G. Greene (Iowa), 408, is not in conflict with this conclusion. The arguments in the case have taken a very wide range, but we regard the questions heretofore considered the controlling ones, and must decline to enter into other fields. The case

of *Furenes v. Mickelson*, 86 Iowa, 508 (53 N. W. Rep 416), although referring to the will of Olson, did not attempt to construe it, and is not an authority for either side of this controversy. The judgment and decree of the district court is **AFFIRMED**.

PETER WEIS, Appellant, v. MORRIS BROTHERS, JOHN T. HAZEN, et al.

Evidence: *NOTES: Motive for delivery.* The motive of the maker of
2 a note in delivering the same is immaterial in an action against
the sureties thereon.

OBJECTIONS: *Best evidence.* An objection to the introduction in evi
3 dence of the record of a mortgage securing the payment of a note
4 in suit, on the ground that it is incompetent because it does not
purport to have been made by the maker of the note, and that it
shows on its face that it has no materiality or relevancy to the
issue, does not raise the objection that the record is secondary
evidence.

Plea and Proof: **CONDITIONAL SURETYSHIP.** Where, in an action
1 against sureties on a note, they plead that certain sureties who
were to sign had not signed, conversations between the sureties
are admissible to show such fact, where plaintiff had knowledge
thereof when he took the note.

Amendment in Trial: **SURPRISE.** Defendants are properly allowed,
5 after the evidence is all in, to amend their answer in an action on
a note so as to set up that the note had been altered by inserting
the figure "8" over the word "ten" in the clause providing for
interest on interest due and unpaid, where no claim of surprise is
made or continuance asked for.

Appeal: **FAILURE TO DEMUR:** *Objection below.* Where plaintiff
3 objects to the filing of an amendment to an answer on the ground
that the evidence was all in, and both parties offer evidence as to
6 the matter in the amendment without objection, and plaintiff
moves to take the defense under such amendment from the jury
because the evidence was not sufficient to sustain it, and offers
instructions as to what must be shown to establish the defense, he
cannot, on appeal, first raise the question that the amendment
does not set up a good defense. While a failure to demur no
longer constitutes a waiver, the first complaint of action below
cannot be made on appeal.

108	327
104	186
106	704
102	327
106	22
102	327
110	244
102	327
114	694
102	327
118	123
102	327
123	212
102	327
134	676
102	327
138	601

Appeal from Pottawattamie District Court.—HON.
WALTER I. SMITH, Judge.

THURSDAY, MAY 20, 1897.

ACTION at law upon a promissory note signed by Morris Bros., James Casady, John T. Hazen, R. W. Beebe, W. H. Knepher, F. H. Guanella, and M. Goodwin. The defendants Casady, Hazen, Knepher, and Guanella alone answer. Their answer presents the following defenses: *First*, that after they had signed the note other signatures were procured thereto without their knowledge or consent; *second*, that
1 they signed said note upon the express condition that the same should be signed by John C. Lee, W. B. Reed, and William Fitzgerald, which condition was known to plaintiff, and was not complied with; *third*, that defendants signed the note as sureties for Morris Bros., which fact was known to plaintiff when he took the note, and he, without the consent of the defendants, made a valid and binding contract with the principal, by which the time of payment of the note was extended; *fourth*, that said note was antedated, with plaintiff's knowledge, after it was signed by the defendants; *fifth*, that said note was altered, after its execution and delivery, by the plaintiff, or with his authority. The plaintiff, in substance, denies the allegations of the answers. The cause was tried to the court and a jury, and the court submitted to the jury special interrogatories, which the jury answered, finding that the defendants signed the note upon the condition that the same should be signed by said Lee, Reed, and Fitzgerald; that plaintiff knew, when the note was delivered to him, that the defendants had signed the note on the condition that said Lee, Reed, and Fitzgerald should sign the same; that plaintiff agreed with Morris Bros. to extend the time

of payment of the note, and that such agreement was made without defendant's consent, and as a part of the consideration of a real estate mortgage which was given; that the note, when executed and delivered, provided that past-due interest should draw ten per cent. interest. There was a general verdict in favor of the defendants, and a judgment was entered thereon, from which plaintiff appeals.—*Affirmed.*

Flickinger Bros. for appellant.

Benjamin & Preston and *Emmet Tinley* for appellees.

KINNE, C. J.—I. Morris was permitted to testify to conversations had between him and his co-defendants, wherein he told them who would sign the note as sureties with them in case they signed it. The evidence was objected to as incompetent and immaterial and hearsay, and the objection overruled, and an exception taken. The ruling was correct. The evidence tended directly to sustain one of the defenses pleaded, and, as there was evidence tending to show that plaintiff had knowledge of these conversations when he accepted the note, it was both competent and material.

II. On cross-examination of Morris, the plaintiff sought to inquire into the good faith of Morris in delivering the note. The evidence was properly excluded. What Morris' motives may have been was wholly immaterial to the issue.

III. To show a consideration for the claimed extension of time of payment by plaintiff to the makers of the note, the defendants introduced in evidence the record of a mortgage securing the payment of the note in suit. It is now said that the court erred in

admitting this record in evidence, because no foundation had been laid therefor, and because the
3 mortgage did not establish any agreement for an extension of the note. The objection was: "To which mortgage plaintiff objected as incompetent, immaterial, for the reason that it does not purport to have been made by the maker of his note, but by a stranger to the record, and that it shows on its face to have no materiality or relevancy to the issue." It will be observed that the objection is not that the offer of the record was not the best evidence. The objection on the ground of incompetency was not general, but limited to the reasons which were expressly set forth in the objection. We are not to be understood as holding that a general objection to the evidence as incompetent would raise the question that the record
4 was not the best evidence. The question argued, that the record was secondary evidence, and no foundation had been laid therefor, is raised for the first time in this court, and cannot be considered. Evidence of the mortgage was material and relevant, as, in connection with evidence showing that it was taken at plaintiff's instance to secure the note, or so accepted by him, it might furnish a consideration for the extension of the time of payment, if such extension was in fact given.

IV. Complaint is made because the court, after all the evidence was in, permitted the defendants to amend their answer setting up the fact that the note had been altered by inserting the figure 8 over the word "ten" in the clause providing for interest upon interest due and unpaid. No claim is made
5 that the plaintiff was surprised by said amendment. No continuance was asked on account thereof. There is nothing to show that the court exceeded its discretion in permitting the amendment to be filed.

V. It is insisted that the court erred in not directing a verdict for plaintiff on the defense of alteration of the interest clause of the note, and that plaintiff's motion to take that issue from the jury should
6 have been sustained. It may be that the amendment pleading said alteration did not state facts constituting a defense. It did not aver that plaintiff or his agents made the alteration. Nor did it state that said alteration was not made with the defendant's knowledge or consent. Conceding, for the purposes of the argument, that these were necessary allegations, is plaintiff now in a situation to take advantage of such defects? Plaintiff claims that under section 1 of chapter 96 of the Acts of the Twenty-fifth General Assembly he waived no right by not attacking the amendment by demurrer, and may now raise the question as to the sufficiency of the pleading. So much of the act referred to as applies to the question now before us provides that "no pleading shall be held sufficient on account of a failure to demur thereto." We do not think that the statute has any application, in view of the condition of this record. Plaintiff objected to the filing of the amendment because it was the fourth amendment, and because the evidence was all in; not a suggestion, even, that it did not set out a good defense. Both parties offered evidence touching the matters pleaded in the amendment, and no objection was made thereto. Plaintiff moved the court to take that defense from the jury because there was no evidence showing that the alteration was made by the plaintiff after the delivery of the note to him. The motion was overruled and an exception taken. Plaintiff then asked the court to instruct the jury as to what must be shown in order to establish that defense. Nowhere in the entire record is the question made that such defense is not sufficiently pleaded. For the first time,

and in the argument in this court, is it claimed that said amendment did not plead facts sufficient to constitute a defense. A party cannot sit by and make no question in the trial court as to the sufficiency of a pleading, and be heard in this court to object thereto. There is not an exception in the record presenting the question we are now asked to determine. The trial court had no opportunity to pass upon it. This precise question was ruled in *Boyd v. Watson*, 101 Iowa, 214 (70 N. W. Rep. 122), wherein it is said: "It is true that chapter 96, Acts Twenty-fifth General Assembly, provides that no pleading shall be held insufficient on account of a failure to demur thereto; but it does not follow that questions can be presented here not presented to the court below. In a law action we review only assignments of error based upon the action of the lower court. Code, section 3207; *Barnhart v. Farr*, 55 Iowa, 366 (7 N. W. Rep. 644); *Wood v. Whitton*, 66 Iowa, 295 (19 N. W. Rep. 907, and 23 N. W. Rep. 675)." The rule that we will not consider on appeal questions not raised below has been announced in a number of cases. *Moore v. Graves*, 97 Iowa, 4 (65 N. W. Rep. 1009); *Shelley v. Smith*, 97 Iowa, 259 (66 N. W. Rep. 172); *Warren v. Chandler*, 98 Iowa, 237 (67 N. W. Rep. 244).

VI. Many objections are urged to the instructions given by the court. We need not give them detailed consideration. We have carefully read the instructions, and find them to clearly and correctly state the law applicable to the case.

VII. There was no error in refusing to sustain plaintiff's motion to take the several defenses from the jury. There was evidence warranting the court in submitting those he did submit to the jury.

VIII. Misconduct of defendants' counsel in argument to the jury is urged as a ground for reversal. The alleged misconduct is denied in a counter affidavit.

The circumstances are not such as to warrant us in interfering.

IX. It is said that the special findings have no support in the evidence. It may be that as to some of the facts found we should not, if sitting as jurors, reach the conclusions that the jury did. Nevertheless we cannot say that they are so wanting in support in the evidence that we should interfere.

X. Finally it is said that upon the whole record the cause should be reversed, and that the evidence does not sustain the verdict. This case was fairly submitted to the jury, under proper instructions, and there is evidence sufficient to sustain the verdict. We cannot, therefore, set aside the finding. We do not discover any reversible error in the record.—AFFIRMED.

THE FIRST NATIONAL BANK OF DUBUQUE, IOWA, Appellant, v. C. H. BOOTH.

Acceptance: AGREEMENT TO CANCEL: *Evidence.* Defendant refused to make a third acceptance until he learned the state of his
 1 account with the drawer, and was furnished with a statement
 2 showing a balance of two thousand nine hundred dollars against him, after crediting him with two prior acceptances of one thousand dollars each. Thereafter he agreed with plaintiff, who held the prior acceptances, that he would accept for two thousand five hundred dollars, "but not to exceed that," and before such acceptance was signed, he reminded plaintiff that he had the two prior acceptances, and in reply plaintiff stated that they would be "taken care of." Plaintiff had previously permitted defendant to renew the prior acceptances, and one of them was about to fall due. *Held,* insufficient to justify a finding that plaintiff agreed to cancel the two prior acceptances.

NAME: *Contract construed.* An agreement by a president of a bank
 1 with one who has just accepted a draft for two thousand five
 2 hundred dollars, payable to the bank, to see that two prior drafts
 3 for one thousand dollars each, which are not yet due, "are taken care of," is simply an agreement for further indulgence on such prior acceptance, and not an agreement that the new acceptance shall be applied to their payment.

Evidence: CONCLUSIONS. Evidence by the acceptor of a draft that
4 certain facts left with him the impression that the president of
the payee bank distinctly understood his original expression that
he would become responsible not to exceed two thousand five
hundred dollars on account of the maker of the draft, is inad-
missible, as the witness' conclusion.

Power of Bank President. Where a president of a bank acted in its
5 behalf in procuring an acceptance, declaration made by him in
regard to the transaction after the acceptance was made, were not
admissible against the bank, since, at the time they were made,
the president's power to bind the bank had ceased.

Appeal from Dubuque District Court.—HON. J. L.
HUSTED, Judge.

FRIDAY, MAY 21, 1897.

THIS is an action at law to recover upon defend-
ant's acceptances of three drafts drawn upon him by
the Novelty Iron Works, as follows: One dated Sep-
tember 1, 1893, for one thousand dollars, payable to
the plaintiff four months after date, indorsed,
"Accepted. C. H. Booth;" and further indorsed,
"Demand, notice and protest waived. Jan. 4, 1894. C.
H. Booth." One dated October 6, 1893, for one thou-
sand dollars, payable to plaintiff six months after
date, indorsed, "Accepted. C. H. Booth;" and further
indorsed, "Demand, notice, and protest waived. C. H.
Booth." One dated December 28, 1893, for two thou-
sand five hundred dollars, payable to the order of the
Novelty Iron Works four months after date, indorsed,
"Accepted. C. H. Booth;" and further indorsed, "For
value received, I hereby guarantee payment of the
within note, and waive demand and notice of protest
on same when due. Novelty Iron Works, G. E. Davis,
Secy. and Treas." This draft, about the date of
defendant's acceptance and before maturity, was sold
and transferred by the Novelty Iron Works to the
plaintiff. The only defense set up in the answer is as

follows: "Defendant, for answer to the petition herein, alleges that the third acceptance mentioned therein was executed by the defendant directly to the plaintiff, and not to the Novelty Iron Works, and that the same was and is without any other consideration than an oral agreement, understanding or condition by plaintiff with defendant, as the inducement thereto and only consideration thereof, that the same should be applied to the payment or cancellation of the first two acceptances mentioned in said petition, and that the surplus or excess not required therefor should be used to secure other liabilities then existing, or represented by plaintiff to exist, in plaintiff's favor, and against said Novelty Iron Works." The same matters are pleaded in the answer by way of counter-claim. Wherefore defendant prays for the cancellation and surrender of the first two acceptances. The case was tried to the court, and judgment rendered in favor of the plaintiff on said two thousand five hundred dollar acceptance, and in favor of the defendant on the other two acceptances. Plaintiff appeals.—*Reversed*.

Powers, Lacy & Brown for appellant.

Henderson, Hurd & Kiesel for appellee.

GIVEN, J.—I. But for the matter set up as defense the plaintiff would be entitled to judgment on all three of the acceptances upon the pleadings, and the inquiry was whether the defendant had established his defense of an agreement as alleged. The burden
1 is upon him to establish this agreement, and this he claims to have done by the testimony of himself and of Miss Fannie Couch, considered in the light of the undisputed facts. Appellant contends that taking this testimony as true, and applying it in the

light of the undisputed facts, it fails to furnish a sufficient basis for the judgment rendered. In pursuing this inquiry, we recognize the fact that this case is not before us for trial *de novo*, and also the well-established rule that the finding of the lower court has the force and effect of a verdict, and will not be interfered with by this court when there is sufficient evidence tending to sustain it, even though the evidence is conflicting. While we will not review the finding of the court or jury upon conflicting evidence, we will inquire whether there is any evidence to support the judgment. In other words, if the defendant has failed to introduce evidence fairly tending to establish the alleged agreement, the judgment is without support, and should be set aside; but if he has introduced such evidence, it must stand, even though the plaintiff has introduced evidence in conflict therewith. Our inquiry is not to reconcile conflicting evidence, nor to say which side of the conflict should prevail, but, taking the evidence introduced by the defendant as true and uncontroverted, we are to say whether, considered in connection with the undisputed facts, it establishes his only defense, the alleged agreement. We will here note the undisputed facts necessary to be noticed, and then turn to the evidence introduced by the defendant to support his defenses. The plaintiff, the defendant, and the Novelty Iron Works are all residents of and doing business in the city of Dubuque. The defendant and Mr. C. H. Eighmey (president of the plaintiff bank) were both directors of the Novelty Iron Works. The defendant was a customer of, and had a large running account with, the iron works, and the iron works was a borrower at the plaintiff bank. On February 1, 1893, the bank discounted for the iron works its draft for two thousand dollars on the defendant, accepted by him, payable in four months. The two acceptances first mentioned

were given in renewal of this draft. The defendant was credited on his account with the iron works with the draft for two thousand dollars. In October, 1893, Mr. Eighmey inquired of defendant if he would accept another draft from the iron works, to which defendant replied that he wanted to see a statement of his account before doing so. About November 1, 1893, a statement of his account was given to the defendant by the secretary of the iron works, which statement showed a balance against him of two thousand nine hundred and sixty-nine dollars and fifty-seven cents. On the twenty-eighth day of December, 1893, Mr. Eighmey, in behalf of the bank, called upon the defendant at his office, and, after a brief interview, left, and returned in a short time, when they had a further interview, and the two thousand five hundred dollars acceptance was then executed. It is upon what occurred at those interviews that the defendant relies as establishing the alleged agreement. There is a conflict in the testimony of defendant, Miss Couch, and Mr. Eighmey as to what was said in those interviews, but it is not as to the conflict that we inquire, but simply whether the testimony adduced by the defendant, taken as true, establishes the alleged agreement. Concerning those interviews the defendant was asked: "Now, state what talk you then had with Mr. Eighmey, and give also what Mr. Eighmey said to you." He answered as follows: "Ans. Mr. Eighmey came into my office on the day, I presume, of the date of that draft, probably some time in the latter part of December, last year, and asked me how much I would become obligated for on account of the Novelty Iron Works. My reply was that at that time I would assume on account of the Novelty Iron Works the sum of \$2,500, but not to exceed that. Mr. Eighmey left my office then, and in a short time, probably not exceeding fifteen or twenty

minutes, he returned to my office with a draft, I supposed it to be. I looked particularly at the amount of it, and not at the wording. The figures at the top I saw were for \$2,500, and I accepted it. I put my name on the back of it. I made my signature so that I guess it can be understood. When he picked the draft

up from the table, I reminded him that there
2 were already two one thousand dollar drafts outstanding and unpaid, which I presumed he held (which turned out to be the fact); and he remarked, as he left the office with the draft, 'I will see that these drafts are taken care of.' I think this the very language he used to me. That left me with the impression that he distinctly understood my original expression to him, when I said I would become responsible not to exceed \$2,500 on account of the Novelty Iron Works." He further testified that he never received any other consideration for the last acceptance than as stated, and that this last draft was not presented to him for acceptance by the iron works. His further testimony is as to a subsequent conversation with Mr. Eighmey, and in denial of what Mr. Eighmey testified was said in the interviews on the twenty-eighth. Miss Couch states: "That Mr. Eighmey came into the office and asked Gen. Booth how much he would become responsible for on account of the Novelty Iron Works, and the general said, 'I cannot become responsible for more than \$2,500.' Mr. Eighmey, I think, then left the office, and in a short time came back with a note, and the general, I presume, signed it, or endorsed it; and the general said, 'You understand, Mr. Eighmey, you have two of my notes now for \$1,000 each, and you will take care of these, will you?' and Mr. Eighmey said he would take care of them. I can't remember much." On further examination she said that she did not remember all that Mr. Eighmey

said. "I don't know as I can tell what Mr. Eighmey replied." In response to a question by the court, she answered: "I don't know as Mr. Eighmey said anything. He left the office after the general asked him to take care of the two other notes, and he was back in about ten minutes." Miss Couch was evidently somewhat confused by the examination, and we do not think that she intends to be understood as saying that Mr. Eighmey returned in about ten minutes after the general asked him to take care of the other two notes. It is manifest, according to her first statement and that of the defendant, that what was said about the other acceptances was in the last interview. The evidence relied upon as showing the agreement alleged may be summed up as follows: That when asked on December 28, 1893, how much he would accept on account of the Novelty Iron Works, the defendant replied: "I would assume on account of the Novelty Iron Works the sum of \$2,500, but not to exceed that." That in the last interview, on the twenty-eighth, Mr. Eighmey, when reminded of the two former drafts, said: "I will see that these drafts are taken care of." Now, taking this evidence as true and uncontradicted, does it tend to establish the alleged agreement? What did the defendant mean, and what did Mr. Eighmey have reason to understand him as meaning, when he said he would accept "for \$2,500, but not to exceed that"? They both knew that defendant had refused to make this third acceptance until he knew the state of his account; that he had been furnished with a statement which showed him credited with the prior acceptances, and a balance against him of two thousand, nine hundred and sixty-nine dollars and fifty-seven cents; and they knew that said prior acceptances were in the hands of the plaintiff and not yet due. With this knowledge, it seems to us entirely clear, that

the defendant could not have been understood as meaning otherwise than that he would not accept to a greater amount than two thousand five hundred dollars, because of his then indebtedness on the account. If it was agreed that this acceptance was to be the total of defendant's liability on acceptances, why was not this one taken for five hundred dollars, or the others surrendered, and why is it that on January 4, 1894, after the last draft was accepted, the defendant indorsed the first, waiving notice and protest? It seems to us that the statement of the defendant that he would assume "\$2,500, but not to exceed that," does not tend, in the least degree, to show that this last acceptance was to be applied to the payment or cancellation of the former. According to the testimony of the defendant, and of Miss Couch in her first statement, it was not until after the acceptance of the two thousand five hundred dollar draft had been signed, and the draft picked up by Mr. Eighmey, that the defendant reminded him of the other drafts, and that he said, "I will see that these drafts are taken care of." If this was the order of events, then, surely, the statement of Mr. Eighmey formed no inducement or consideration to the execution of the acceptance, and does not in the least tend to establish the alleged agreement. Assume, however, that it was before the acceptance was signed that the defendant called Mr. Eighmey's attention to the other drafts, and that Mr. Eighmey said that he would see that they were taken care of, still it does not seem to us to tend to show such agreement. According to the testimony, the defendant merely reminded him of them, and asked nothing with respect to them. When it is remembered that the bank had permitted the defendant to give the two prior drafts in renewal of a former one, and that these prior drafts were soon to fall due, it seems to us clear, that Mr. Eighmey's

answer was with reference to further indulgences to the defendant, and cannot be construed as meaning that those drafts were to be canceled. We do not discern any theory upon which the evidence of the defendant and Miss Couch can be held, under the undisputed facts, to tend to show the agreement alleged in the answer.

II. Appellant complains of certain rulings of the court in admitting and rejecting testimony. Appellee in his deposition, in answer to interrogatory twenty, said, in relation to the interviews of December 28,

1893: "That left me with the impression that
4 he distinctly understood my original expression to him, when I said I would become responsible not to exceed two thousand five hundred dollars on account of the Novelty Iron Works." This was clearly a statement of the witness' conclusion, and not of a fact. It was for the jury, not the witness, to say what conclusion should be drawn from what was said and done. Appellee relies upon *Stoughtenburgh v. Dow*, 82 Iowa, 180, as sustaining this ruling. In that case a material issue was whether certain machinery was defective, and the witness stated that he had made complaint about it to the head miller, and that he gave witness to understand that he would remedy it as soon as he had time. This was held admissible, as tending to show an admission of the defect, but not to establish an agreement, as in this case. We think this evidence should be excluded. Appellee testified to certain con-

5 versations about the transaction had with Mr. Eighmeyer after it was completed. Mr. Eighmeyer acted for the bank in procuring the acceptance, and when that was completed, his power to bind the bank ceased, and therefore his subsequent declarations were not admissible. The same is true as to a certain letter that was admitted in evidence. This evidence was

not offered for purposes of contradiction. Appellant offered in evidence the statement of the account of appellee with the Novelty Iron Works that had been furnished to appellee at his request. This was excluded on appellee's objection. We think it should have been admitted, but we would not reverse upon this ground alone, as all the material facts shown therein otherwise appear beyond dispute. For reasons stated, the judgment of the district court is REVERSED.

EDWIN B. WILHELM, Executor of the Estate of MARY WILHELM, Appellant, v. CHARLES A. CALDER, Administrator, et al.

Construction of Will. The will gave the wife a share of the net income of

- 1 the entire estate, to be paid in monthly installments, and provided
- 2 that such share of the income should be added to, if needed, to make a stated sum. It gave the residue of the estate to named children with the provision that the executor should hold it until the wife died, and if she died before the youngest child became of age, until such child attained its majority, at which time the executor should divide the estate remaining, equally between "the children then living." *Held,*

- a. The estate did not vest in the children at testator's death,
- 3 hence the representatives of one of the children who died during the life of the widow and before the youngest child became of age took no interest in said estate.
- b. The rule that where there is an absolute devise to a specified
- 2 person, subsequent limitations are void for repugnancy, has
- 4 no application.
- c. Said representatives can take nothing under a provision that if any surplus remains after paying debts and other directed expenditures, the executor, at the end of the year, shall pay each child such share as such surplus shall warrant.

Appeal from Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

FRIDAY, MAY 21, 1897.

102 342
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102 342
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102 342
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135 115

Suit in equity for the construction of the will of C. E. Calder, and for a division of his estate. The lower court sustained a demurrer to the plaintiff's petition, and he appeals.—*Affirmed.*

Jamison & Smyth for appellant.

Rickel & Crocker for appellees.

DEEMER, J.—This suit involves a construction of the will of C. E. Calder, deceased, who died testate at Cedar Rapids on December 31, 1889. The material parts of his will are as follows: "I give and
1 bequeath to my wife, Alcinda A. Calder, my family horse, buggy, and harness, and all of my household furniture of every kind and nature used by us in and about our homestead. I also give and bequeath to my said wife the one-third ($\frac{1}{3}$) of the net income of my whole estate, to be paid to her in monthly installments by my executor hereinafter named, commencing thirty days from and after my death. And, in the event that such monthly installments should not equal the sum of seventy-five (75) dollars per month, my said executor shall pay to my said wife enough out of the remaining funds of my estate to make her income at least seventy-five (75) dollars per month, and shall also pay to my said wife out of the income of my estate, after deducting the one-third ($\frac{1}{3}$) above mentioned, going to her, a reasonable compensation per month for the care, maintenance, clothing, schooling, and support of all my minor children until each shall become of lawful age, as may be agreed upon by my said wife and my said executor. And also, in the event that my said wife shall elect to build her a home on any of my property, the said executor is hereby

authorized, empowered and directed to erect such home for my said wife out of the remaining two-thirds ($\frac{2}{3}$) of the funds of my said estate, not, however, exceeding the sum of thirty-five hundred (\$3,500) dollars to be expended therefor; but the title of such home shall remain in my said estate, subject to the use of same by my said wife during her life as a homestead only. The allowance above provided for my said wife shall be paid her during her life, and at her death said executor shall provide the means from my said estate for payment of last sickness, funeral expenses, proper burial, and suitable monument. The above provision made for my said wife shall be received by her in lieu of all dower, right, title, and interest in and to my said estate. 2d. The residue of my estate, both real and personal, I give and bequeath to my children, viz., Mary E. Calder, Edith M. Calder, Chas. A. Calder, Adeline E. Calder, Lewis B. Calder, Cornelia C. Calder, and George A. Calder, equally; but the said property is to be held by my said executor hereinafter named until after the death of my said wife, Alcinda A. Calder. And, in the event that my said wife shall die before the youngest of my surviving children become of age, then said property shall be held by my said executor until my said youngest surviving child shall become of age, at which time "the whole of the remaining part of my said estate shall be divided equally between my said children then living, share and share alike, and descend to them in fee simple." "After all of my debts are fully paid and discharged, should any surplus moneys remain in the hands of my executor, over and above what will be actually necessary to provide for the payment already directed, my said executor at the end of any year shall pay to each one of my children such sum of money as the surplus on hand will warrant. And should any of my said children at the time of

such payment not be of age, the amount going to such child or children, shall be retained by my said executor, and loaned by him for the use and benefit of such child or children until they become of age, and when they become of age, he shall turn the same over to them. The payment made to each of my said children shall be equal, each sharing alike." Appel-

2 lant is the executor of Mary E. Wilhelm (formerly Mary E. Calder), the person of that name mentioned in this will, who died during the lifetime of her mother, Alcinda A. Calder, and before the testator's first child became of age, and, as such, claims that under the second and fourth clauses of the will the interest of the children named therein, including Mary E. Wilhelm, vested at once on the death of the testator, and that the time of enjoyment, only, was postponed. The argument is, that it is the duty of the court to so construe the terms of a will as to create a vested estate, if possible; and that the intent to postpone the vesting of an estate must be clear and manifest. Appellant further insists upon the application of this rule: "That when an estate or interest in lands is devised in clear and absolute language, without words of limitation, the devise cannot be defeated by a subsequent contradictory provision, or a condition inferentially raising a limitation upon the devise or bequest."

Looking now to the first and second clauses of the will, it is perfectly clear that the testator did not intend that the estate should vest in his children in any event until after the death of his wife, for

3 certain charges are created upon it by the first paragraph which make present vesting entirely impracticable. The will also expressly provides that, in the event his wife should die before the youngest of the surviving children shall have become of age, then the property shall be held by the executor until said

child becomes of age, at which time the whole of the remaining estate shall be divided equally between his children then living, share and share alike, and descend to them in fee simple. Clearer language to postpone the vesting of his estate could hardly have been selected by the testator. As the record shows that Alcinda A. Calder is yet alive, and was made a party to this suit, and further discloses the fact that she accepted the provision made for her by the will in lieu of dower, as by statute provided, there is no doubt whatever of the correctness of the ruling on the demurrer. Any other construction would render nugatory some of the language of the will, and thwart the manifest intent of the testator; for he evidently intended to postpone the vesting of his estate in his children until the death of his wife, in the event she died before the youngest became of age. And in the event she should die after the happening of this contingency, then the surviving children only were entitled to take under the will. The case of *Ducker v. Burnham*, 146 Ill. 9 (34 N. E. Rep. 558), relied upon by appellant, does not announce a contrary doctrine. In that case the widow was dead, and the child who sought to take under the will was living,—exactly the reverse of the facts appearing in the case at bar. Again, the conditions of the two wills are manifestly so different that the same rule cannot be applied to the two cases. In the Illinois case, the will did not provide, as in this, that at the death of the wife the property should be divided between the children then living. The case of *Baker v. McLeod's Estate* (Wis.) 48 N. W. Rep. 657, also relied upon by appellant, is not in point. We need not review all the cases cited by appellant; for, as we have frequently said, cases are of little help, except as they settle rules and principles by which to arrive

at the intent of the testator, which is always the pivotal point of inquiry in such controversies as this.

It is argued, however, that there is an absolute devise to the children in the second paragraph of the will, and that any subsequent limitation or condition is void for repugnancy. In construing this paragraph, all of the language should be considered, for the presumption is that it was used advisedly and for a purpose; and the words used should be studied as a whole, in order to arrive at the testator's intent. Scanning the paragraph as a whole, it is clear that there is an absolute devise to such of the children as should survive at the time the youngest of them became of age, but it was not to vest until the happening of two events: *First*, the death of the widow; and, *second*, the arrival at age of all the minor children. There is no room for application of the doctrine relied upon by appellant, and referred to in the cases of *Bills v. Bills*, 80 Iowa, 270 (45 N. W. Rep. 748); *In re Proctor's Estate*, 95 Iowa, 172 (63 N. W. Rep. 670), and cases cited. The case is more like *Jordan v. Woodin*, 93 Iowa, 453 (61 N. W. Rep. 948), and *Grindem v. Grindem*, 89 Iowa, 295 (56 N. W. Rep. 505), than any to which our attention has been called. It may be observed in passing that, in the opinion of the writer, a majority of this court has, against his protest, entirely abrogated the rule upon which appellant relies. See *Imas v. Neidt*, 101 Iowa, 348 (70 N. W. Rep. 203). But, be this as it may, we are all agreed that this case does not fall within the rule. Appellant is not entitled to anything under the fourth paragraph of the will, for it is evident that the surplus money therein referred to was to be divided among his children; not bequeathed to their representatives. Appellant, as executor of the estate of one of the children mentioned in this will, has no interest in the

property left by Charles E. Calder at his decease, and the judgment of the district court so declaring is **AFFIRMED.**

H. H. LANTZ v. J. J. RYMAN, et al., Appellants.

Contract: DISSOLUTION OF INSURANCE AGENCY. An agreement
1 between persons in the business of a fire insurance agency by
which one of them sells his interest in the agency to the others,
agreeing not to apply for nor accept specified companies, with the
distinct understanding that he does not sell his good will in any
"of the business or renewals now on the books of the agency, but
reserves the full right and privilege of soliciting, securing, and
writing any of the same," entitles such member to issue policies
in place of those expiring as well as those in renewal of policies.

Evidence: PAROL VARIANCE. It appeared that the firm kept an
1 expiration register, and that the terms "renewals" and "expira-
2 tions" were used by insurance men interchangeably. *Held*, that
parol evidence of contemporaneous conversations between the
parties or subsequent statements by plaintiff, were not admissi-
ble to prove that he sold to defendants his interest in the expira-
tions.

PAROL VARIANCE. Plain and unambiguous language in a written
3 contract cannot be varied by evidence of declarations of one of
the parties, made after the execution of the contract.

FALSE REPRESENTATIONS. A representation by a retiring member
4 of a firm of insurance agents that he has no copy of the expira-
tion list of policies, even though false, is immaterial where the
dissolution agreement reserved to him his good will in the busi-
ness and the right to solicit and secure renewals of policies.

Appeal from Polk District Court.—HON. T. F. STEVENSON, Judge.

FRIDAY, MAY 21, 1897.

ACTION to recover an amount alleged to be due on an agreement in writing. The defendants pleaded a failure of consideration, fraud on the part of the plaintiff in obtaining the agreement, and mistake in consequence of which the agreement actually made was

not incorporated in the writing signed. They asked that the writing be reformed. There was a hearing on the merits, and a judgment in favor of the plaintiff. The defendants appeal.—*Affirmed*.

George R. Sanderson and McVey & McVey for appellants.

Gatch, Connor & Weaver for appellee.

ROBINSON, J.—In the first part of the year 1889, the plaintiff purchased an interest in the business of Ingersoll, Howell & Co., and became a partner of the firm. Changes subsequently occurred, and for some time prior to the signing of the instrument in suit the firm had been composed of the plaintiff, Adam Howell, and the defendants, J. J. Ryman and H. R. Howell, who transacted business in the firm name of Ryman, Lantz & Howell. The business was that of a local fire insurance agency in the city of Des Moines, and the firm represented several different companies. The defendants and Adam Howell finally became dissatisfied with the plaintiff, and attempts were made to effect an agreement by which the partnership relation should be severed. After somewhat lengthy
1 negotiations, the writing in suit was signed.

The following is a copy of it: "April 25, 1894. Memorandum of Agreement Made This Day. H. H. Lantz hereby agrees to sell to J. J. Ryman and H. R. Howell his interest in the agency heretofore known as Ryman, Lantz & Howell; agreeing, in the transfer of companies in the organization of the new agencies, not to apply for nor to accept the following companies, namely: London & Liverpool & Globe Insurance Co. of North America, Phoenix, Springfield, Niagara, Atlas, German-American, Commercial Union, London Assurance, Hawkeye, and American of Pa.; and in

consideration therefor the said J. J. Ryman and H. R. Howell hereby agree to pay therefor the sum of \$1,200, and assign and agree not to take the Franklin, American of New York, St. Paul & Western, and to also use their influence in securing the transfer of the Pennsylvania Fire to Lantz, but not to be barred from taking the Pennsylvania Fire if they refuse to go to said H. H. Lantz. It being distinctly understood and agreed, that the said H. H. Lantz does not sell his good will in any of the business or renewals now on the books of the agency, but reserves the full right and privilege of soliciting, securing, and writing any of the same. After the payment of the debts of the old firm, the remainder of its funds shall be distributed according to the co-partnership agreement, which shall be in addition to the \$1,200 above stated. This agreement to take effect May 1, 1894. [Signed] H. H. Lantz. J. J. Ryman. H. R. Howell." The payment for which this writing provides has not been made, and the plaintiff seeks by this action to recover it. The answer of the defendants states that the firm of Ryman, Lantz & Howell had no proprietary interest in the agency of the several insurance companies which it represented, and that the plaintiff could not sell or transfer any interest therein to the defendants; that the sole assets of the firm consisted of a small balance of profits after the debts should be paid, and in the renewal list owned and kept by the firm; that the business of the firm was considerable, and several hundred patrons were listed on its books; that it kept an expiration register, showing the name of each person assured, the date upon which his policy and insurance would expire, and the amount of the insurance carried; that by the expiration list the members of the firm were enabled to know when and to whom to go for the renewal of insurance, and that the list was valuable; that the only thing the plaintiff sold to the

defendants by the agreement in question, was his interest in the expiration list. The answer further alleges that the agreement was without consideration and procured by fraud, and is void, in that at the time it was entered into, and before and after that time, the plaintiff represented to the defendants that he had not kept a copy of the expiration list, and had no copy whatever, and would not take a copy of it, but that he would sell and deliver the list to the defendants, but that the truth was that he had secretly, and without knowledge of either of the defendants, taken and copied the expiration list, and had a complete transcript of it, which he kept, and from which, immediately after the dissolution of the firm, he solicited the renewal of insurance. The answer further states that just before the agreement was signed the defendants stated to the plaintiff that they understood by the terms and conditions of the agreement that they were buying the plaintiff's interest in the expirations; that the agreement seemed to be somewhat ambiguous upon that point, but that the expiration list was substantially all there was to buy,—and that the plaintiff replied that he was selling to them his interest in the list, and that he understood the contract as these defendants stated it; that the defendants relied upon these statements of the plaintiff, and upon his representation that he did not have a copy of the list, nor any part of it, and that he only retained the right to conduct an insurance agency in Des Moines, and, so relying, signed the agreement. In an amendment to their answer the defendants set out what they claim to have been the real agreement of the parties, and ask to have the one actually signed reformed. The district court rendered judgment in favor of the plaintiff for the sum of one thousand two hundred dollars, with interest thereon at six per cent. per annum from the first day of May, 1894, and costs.

There is much conflict in the evidence respecting what was said between the parties to the agreement at the time it was signed, and at an interview had a few days later, before it was to take effect. If the testimony in regard to what was said on those occasions was to be considered alone, we should be forced to conclude that the defendants' claims as to the facts are sustained. But the plaintiff denies in the most positive terms much of what the defendants and others, for them, testified to; and we must consider, not only what is claimed to have been said by the parties, but the writing itself, which is of controlling importance, and relevant circumstances which existed at the time. When the plaintiff became a member of the firm of Ingersoll, Howell & Co., he paid the sum of two thousand four hundred dollars for the interest he acquired; and during his connection with the business it had increased in value, and his interest was worth more at the time of the transaction in controversy than that which he originally purchased. During the negotiations which preceded the making of the agreement in controversy, two propositions were made, by one of which the plaintiff was to receive from the defendants two thousand four hundred dollars, retire from the firm, and not engage in the insurance business for a term of years. By the other proposition, he was to receive one thousand two hundred dollars, and retain the privilege of doing an insurance business on his own account. Finally, Ryman drew a proposition in the form of an agreement, which, with the exception of one or two provisions, was substantially the same as the one which was signed. Some changes were made in it, but the plaintiff refused to sign it, and took it from the office of the firm where it was drawn, to his attorney. There it was changed to read as it did when it was signed, and he returned with it to the defendants. The paragraph which reads as

follows: "It being distinctly understood and agreed that the said H. H. Lantz does not sell his good will in any of the business or renewals now on the books of the agency, but reserves the full right and privilege of soliciting, securing, and writing any of the same,"—was inserted in the attorney's office, and was read and fully considered by the defendants before the agreement was signed. They knew just what they were signing, and it must be presumed that they were possessed at least of ordinary intelligence, and that they knew what the paragraph last quoted meant. It was clear and explicit, in language which men

2 familiar with insurance business could not have misunderstood. Some attempt is made to show that "renewals" are not the same as "expirations," but the testimony of disinterested insurance men shows clearly that the terms are used interchangeably, and mean substantially the same thing, when used in the insurance business. But, if this were not so, the language of the paragraph is sufficiently broad to include expirations; for it reserves to the plaintiff his good will in the business, and the right of "soliciting, securing and writing" "any of the business or renewals" then on the books of the agency. It would be a wide departure from the ordinary rules of practice to permit language so plain and direct as this to be contradicted by proof of contemporaneous verbal statements, and that is what the defendants seek to do by showing that the language used in the writing was to be given a meaning wholly different from that which it ordinarily bears. Nor can

3 the language used be given a different effect by showing declarations of the plaintiff made after the agreement was signed. But it is said that the plaintiff was guilty of fraud, in representing that he did not have a copy of the expiration list when the agreement was signed. We very much doubt that he

represented that he did not have a copy of any portion of that list, for the reason that portions of it were copied into small books from time to time, and some of those had been furnished to him in the ordinary course of business. But his
4 representations, whether they were as claimed by the defendants or not, were immaterial, in view of that part of the agreement which reserved to him his good will in the business, and the right to solicit and secure renewals. The defendants have failed to show, by the kind and weight of evidence required, that the agreement was induced by fraud, or that they were mistaken as to its provisions when they signed it. Our conclusions find support in the following authorities: *Marshall v. Westrope*, 98 Iowa, 324 (67 N. W. Rep. 257), and cases therein cited; *First Presbyterian Church v. Logan*, 77 Iowa, 326 (42 N. W. Rep. 310); *Dirkson v. Knox*, 71 Iowa, 728 (30 N. W. Rep. 49); 1 Greenleaf, Ev., sections 275, 281; 2 Pomery, Eq. Jur., section 859. Nor have they shown that the consideration for the agreement has failed. The defendants not only retained the permanent record of the expirations, and the right to solicit and obtain all the renewals possible, and the agency of certain companies, as provided in the agreement, but they also retained three of the five companies which the plaintiff was to have if he could secure them. It is true, the defendants claim to have rescinded the agreement when they discovered the alleged fraud of the plaintiff, and that they had a right to ignore it, but a rescission which repudiates the obligations of an agreement while retaining its benefits is not looked upon with favor by a court of equity. We are satisfied that the evidence fully sustains the judgment of the district court, and it is **AFFIRMED**.

IN THE MATTER OF THE GUARDIANSHIP OF GEORGE M.
O'CONNELL, a Minor.

Appointment of Guardian: DISCRETION OF COURT. As between an unmarried woman whose employment as school teacher was not permanent, and her married sister, who already had the custody of their eight years old nephew, and was able and willing to care for him as one of her own children, the court properly selected the latter as guardian.

SAME. Where testatrix's eight years old son had a good home with his married aunt, who was able and willing to care for him, her appointment as guardian in preference to persons who were not relatives was not a clear abuse of discretion, though testatrix requested the appointment of the latter in her will, and orally expressed such desire shortly before her death, and though the fitness of such persons is not questioned.

Appeal from Linn District Court.—HON. WILLIAM P.
WOLF, Judge.

FRIDAY, MAY 21, 1897.

ELLEN O'CONNELL, surviving parent, died January 4, 1895, leaving an only child, George M. O'Connell, eight years old. She left a will, to which was attached, by way of a codicil, this request: "I wish it to be understood by the court that it is my desire to have the executors of my last will and testament, Dr. A. H. Johnson and Dr. G. R. Skinner, to be appointed guardian of my son, Geo. M. O'Connell, until he become of age." Application was made for the appointment of Theresa O'Connell, a sister of deceased, as guardian of the child; also for that of Drs. Skinner and Johnson, and of Anna M. Donahue, another sister. After hearing, the court appointed the latter permanent guardian. Theresa O'Connell and Drs. Skinner and Johnson appeal.—*Affirmed.*

Rickel & Crocker for appellants Skinner and Johnson.

Preston, Wheeler & Moffit for appellant Theresa O'Connell.

Rothrock & Grimm for appellee Anna M. Donahue.

LADD, J.—The appeal of Theresa O'Connell may be first considered. The evidence shows that she is unmarried, and her occupation that of a school teacher. She was always on good terms with
1 the child and its mother, but has no affection for him other than that of a near relation. Her employment is not permanent, and existing conditions may reasonably be expected to change. On the other hand, Mrs. Donahue is a married woman, now has custody of the child, treats him as one of her own children, is able to care for him, and wishes to do so. True, she had at one time some dispute with her deceased sister, but not of such a character as would interfere with the proper nurture and training of this son. Under the circumstances, we think the court rightly permitted the minor to remain with Mrs. Donahue.

II. A more difficult question is presented by the appeal of Drs. Skinner and Johnson. The mother requested in her last will that they be guardian of her son and orally expressed her desire to the same
2 effect, shortly before her death. Testamentary guardianship is not authorized in this state, *In re Johnson*, 87 Iowa, 130 (54 N. W. Rep. 69); but the expressed wish of the parent, and especially when made shortly before dissolution, will influence the court, and other things being equal, will determine the appointment. 9 Am. and Eng. Enc. Law, 93, and

notes. No question concerning the fitness of either Dr. Skinner or Dr. Johnson is raised, and they are willing to act as guardian without compensation. They are not related to the child, however, and undertake the trust largely because of the dying request of the mother. What disposition would be made of the child by them does not appear. What has already been said of Mrs. Donahue's care of the child need not be repeated. He has a good home with her, is contented, and well provided for. She is his aunt, and has a natural interest in his welfare. The dispute with the child's mother, heretofore referred to, was occasioned by the claim that the conveyance of forty acres of land by her father to her brother was in the nature of an absolute gift, and not by way of an advancement. The evidence that she referred to her sister in opprobrious terms is indignantly denied. Her property interests and those of the child are not in conflict. Were this case triable *de novo*, however, we should feel bound to regard the dying request of the mother. It is prosecuted by ordinary proceedings, and "the findings of the court are entitled to the effect of a verdict, as all the reasons for the rule as to verdicts apply with at least equal force to the findings of the court." *Lawrence v. Thomas*, 84 Iowa, 362 (51 N. W. Rep. 11). The selection of a guardian is, of necessity, largely within the discretion of the court appointing, and it is only when there is a clear abuse of discretion that this court will interfere. *In re Johnson*, *supra*. The welfare of the boy is of controlling importance, and we cannot say from the record before us that the district court so abused its discretion as to justify interference with its decision.—AFFIRMED.

102	358
109	654
102	358
126	639

102	358
130	186

ROSE FURLONG V. THOMAS CARRAHER, Appellant

Evidence: OPINIONS. A non-expert witness cannot give her opinion as to the mental capacity of testatrix unless such opinion is based solely on facts relating to the conduct and action of the testatrix as detailed in the evidence of the witness.

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

FRIDAY, MAY 21, 1897.

THE parties, as indicated, are brother and sister, and children of Bridget Carraher, deceased, who died in February, 1894, leaving what purported to be her last will and testament, which was filed for probate; and the defendant, Thomas Carraher, is residuary legatee therein. The plaintiff contests the probate of the will by written objection, representing that Bridget Carraher, when she executed the instrument, was not of sound and disposing mind, and that the same was executed under undue influence by Thomas Carraher. The issues were submitted to a jury that returned a special verdict that Bridget Carraher was not, at the execution of the instrument, of sufficient capacity to make a will. The district court denied a motion to set aside the special verdict and grant a new trial, and entered judgment setting aside the will from which the proponent appealed.—*Reversed.*

F. W. Dodson and *A. A. McLaughlin* for appellant.

Nugent & Connelly for appellee.

GRANGER, J.—Bridget Lindsey and Mrs. Mary Wilson were witnesses for the contestant, and each gave evidence of having known the deceased,—the former all her life (being a niece), and the latter since 1869 or 1870. Each testified particularly to Mrs. Carraher having been at her house in September, 1893; her death occurring in February after. Each testified to her appearance as to health, how she appeared in mind, to what she said on different matters, to her changed appearance from former times, and to what she said about the disposition of her property, tending to show that she could not do as she would like to. The first of the following questions was asked of Bridget Lindsey, and the other of Mrs. Wilson: "Q. Now, what do you say from your knowledge of her as you have testified, and from your acquaintance with her, and your conversations,—what do you say as to whether, in your judgment, she was sufficiently strong in mind to understand the value of her property, and the disposition to make of it in regard to the children, and the effect of the disposition of it upon her children, at the last time that she was at your house?" "Q. From what you saw of Mrs. Carraher on that occasion, in September, 1893, and from her actions and conduct, state whether, in your opinion, she was possessed of mind,—strength of mind,—enough to understand the effects of a will, and the results of a will upon her property and upon her children,—the making and executing of a will." Answers were permitted against objections that they were incompetent. The claim, in argument, is that the questions permitted the witnesses to base their opinions on facts not disclosed by the evidence. The rule as first stated in this state is: "The extent to which any of the authorities have carried the rule, even in the ecclesiastical courts of England, is that, after the witness

has stated the facts and circumstances, then his conclusion or opinion derived from or resting upon them may be given." *Pelamourages v. Clark*, 9 Iowa, 1. The rule as thus announced seems to have been clearly adhered to by this court. It is a rule as to non-expert evidence, forming an exception to the general rule of evidence, whereby statements of conclusions in the nature of opinions are limited to those who, by education or particular experimental knowledge, are deemed especially fitted to form such opinions. In *State v. Stickley*, 41 Iowa, 232, a witness, after narrating his observations of the person, was asked: "Will you state from your knowledge before, and your acquaintance with her from her conversation at the time and her looks at the time, whether, in your judgment, she was in her right mind?" The question was held incompetent, because it permitted an opinion based on facts not detailed to the jury. See, to the same effect, *Ashcraft v. De Armond*, 44 Iowa, 229. A case more clearly in point, is that of *Parsons v. Parsons*, 66 Iowa, 754 (21 N. W. Rep. 570, and 24 N. W. Rep. 564). The question was: "Now, Mr. Parsons, from what you heard Father Parsons say to other members of the family, and from what you observed there that morning, what do you think as to the condition of his mind that morning?" It is said in the opinion: "It will be observed that the question asked was not confined to facts to which the witness had testified," and the question was held improper. The rule has support in *Blake v. Rourke*, 74 Iowa, 519 (38 N. W. Rep. 392), and *Denning v. Butcher*, 91 Iowa, 425 (59 N. W. Rep. 69). It is further said in the *Parsons Case*: "The witness was permitted to exercise her discretion as to what facts and circumstances she should take into consideration." It seems to be the import of the rule that the jury shall know upon what facts the witness

bases the opinion given, and hence the question must in some way make the limitation, as by confining the answer or opinion to the facts as stated in evidence. The first clause of the question to Bridget Lindsey is limited, but the remainder of the question permits facts to be considered other than those testified to. The question to Mrs. Wilson is without any limitation to the facts testified to. If we treat it as limiting the answer to the occasion in September, 1893, the answer is not limited to the actions, conduct, and what was seen, as detailed in the evidence. We cannot assume that the evidence disclosed all the conduct and all that was seen. We think the rule of evidence was violated in the admission of non-expert evidence. The other question argued is as to the sufficiency of the evidence, of which we should express no opinion, in view of a new trial.—REVERSED.

D. A. POE, Appellant, v. MARY E. EKERT.

Equitable Lien: IMPROVEMENT OF WIFE'S PROPERTY. Where a husband agrees with his wife to erect improvements on her land, and to pay for the same, one selling lumber to the husband on his credit, and without intent to charge the wife thereby, cannot enforce an equitable lien against the land.

Appeal from Page District Court.—HON. N. W. MACY,
Judge.

SATURDAY, MAY 22, 1897.

ACTION in equity to establish a lien upon certain lots for a balance due to plaintiff on account for lumber furnished and used in the erection of a dwelling house on said lots. Decree was rendered dismissing plaintiff's petition, "upon the ground that the plaintiff fails to show that the lumber and material were not sold to defendant's husband, relying alone upon

his credit." From this decree the plaintiff appeals.—
Affirmed.

W. P. Ferguson for appellant.

T. E. Clark for appellee.

GIVEN, J.—I. About three years prior to 1892, M. B. Ekert, husband of the defendant, purchased and paid for out of his own money six lots in the town of Essex, and caused the title thereto to be made to his wife, who continues to hold the same. In 1892, Mr. Ekert proceeded to erect a dwelling house on said lots to be used as a residence for himself and family, procuring the lumber for that purpose from the plaintiff, and for which there is a balance of two hundred and ninety-four dollars and forty-seven cents due to the plaintiff. In support of his claim for an equitable lien appellant relies upon *Miller v. Hollingsworth*, 36 Iowa, 163, and cases following the ruling therein. In that case the court says: "Giving to the averments of the petition, and especially the averment that the lumber was furnished and used in the improvement of the defendant's real property 'with the full knowledge and acquiescence of the defendant,' a liberal construction, we hold that the demurrer should have been overruled. Full knowledge and acquiescence, under such an interpretation, would imply that the defendant knew the lumber was purchased by the husband without being paid for by him; that, while it was so unpaid for, it was being used in the improvement of her real estate to the enhancement of its value; and that she acquiesced in such use with such full knowledge of those facts. It should also appear that it was not, in fact, sold to the husband in reliance upon his credit alone." It is further said: "Of course, her want of acquiescence might be manifested by fewer facts or slighter circumstances

than would be required from an adult male owner." No doubt the defendant knew that this lumber was being furnished and used in the construction of the building on her lots, and acquiesced therein, but she did not know nor acquiesce in its being made a charge against her or her property. The understanding between her and her husband was that he would pay all the expenses incurred in erecting the building. It does not appear that the lumber "was not, in fact, sold to the husband in reliance upon his credit alone," but, on the contrary, we think it fairly appears that the credit was to him alone. The plaintiff testifies: "The contract was with Mr. M. B. Ekert. Had no talk with Mrs. Ekert when debt was contracted. * * * I don't know that he bought it with his wife's knowledge. * * * My agreement was made with Mr. Ekert. I never had any conversation with her about it. My entire contract and deal was with him. * * * He had been doing business that way as long as he traded with me. Had been doing all the business himself. He bought lumber before. I don't know who he bought it for. He bought it to improve her property. I don't know that he bought it in her name or her credit or with her knowledge. I did not ask him." Mr. Ekert testified that Mr. Poe was to furnish the material; that he was to pay one hundred dollars when the house was finished, and to pay the balance out of his pension as fast as he could; that there was nothing said about a lien on the property; and that the agreement was, that appellant was to look to Mr. Ekert alone for pay. Appellant testified: "No; I don't think he told me that he wanted me to pay it out of his pension. I would almost be willing to swear that he did not tell me that he would pay for it out of his pension." We will not discuss the evidence further. It is sufficient to say, that it fully

sustains the claim of the defendant, that the lumber was sold to her husband on his credit alone.—
AFFIRMED.

V. S. POWELL, Appellant, v. J. C. CRAMPTON.

Statute of Frauds: ORAL LEASE. An oral agreement to lease is not taken out of the statute of frauds by testimony of the alleged lessor, that, while a lease was negotiated, its terms were not fully settled. Omissions from the alleged lease cannot be supplied by evidence other than defendants; neither is defendant estopped to deny the lease.

PART PERFORMANCE. Part performance of an oral contract to lease land, for the term of more than one year, does not take the case out of the statute of frauds, and evidence for that purpose is not admissible.

Appeal from Polk District Court.—HON. T. F. STEVENSON, Judge.

SATURDAY, MAY 22, 1897.

ACTION for the specific performance of a contract to lease a part of a lot in the city of Des Moines. Decree for the defendant, and plaintiff appeals.—
Affirmed.

J. A. Merritt for appellant.

Dudley & Coffin for appellee.

LADD, J.—On the eleventh day of April, 1890, the defendant in writing leased the part of the lot in controversy to Williams & Powell, who were owners of the brick building thereon, for a term of two years and six months, at the rental of twelve dollars and fifty cents per month. Williams & Powell sold the building, and assigned the lease to J. C. Powell, February 1, 1892, and he continued in occupancy of the premises till March 5, 1895; paying, after the expiration of

the written lease, twenty-five dollars per month, though no term was fixed. He sold the building to the plaintiff, March 5, 1895, who took possession the day following. The plaintiff claims that he entered into an oral contract with the defendant by which the latter was to lease the land to him for a period of five years. The defendant denies making the contract, and insists that, if made, it cannot be established by oral testimony.

I. The appellant cites authorities holding that part performance of an oral contract to lease land for a term of more than one year will take the case out of the statute of frauds. Such is not the construction given the statute in this state, and evidence for that purpose is not admissible. *Hunt v. Coe*, 15 Iowa, 197; *Thorp v. Bradley*, 75 Iowa, 50 (39 N. W. Rep. 177); *Burden v. Knight*, 82 Iowa, 584 (48 N. W. Rep. 985).

II. It is insisted that the defendant's testimony, considered alone, establishes an oral agreement to lease. If so, the plaintiff is entitled to the relief prayed. *Auter v. Miller*, 18 Iowa, 405; *Smith v. Phelps*, 32 Iowa, 537; *Dewey v. Life*, 60 Iowa, 361 (14 N. W. Rep. 347). The plaintiff claims that the lease was to be for five years from April 1, 1895, and that he was to expend for improvements on the building the sum of five hundred dollars by September 1 following. The defendant testified that the time from which the lease was to run was not agreed upon; that nothing was said about the value of improvements; that he never consented to a delay till September before the improvements should be made; and that their character was not fully determined, but he was to state what they should be in the written lease, and submit it to the plaintiff's agent, J. C. Powell. According to this evidence, the terms of the contract were not fully settled, and omissions cannot be supplied by other evidence. *Auter v. Miller, supra*. It is urged that the

defendant is estopped from denying an oral contract to lease. The trouble with this position is that such a contract has not been established by competent evidence. That upon which the claimed estoppel is based was not admissible. The decree of the district court must be **AFFIRMED**.

SEBASTIAN LUDWIG v. E. A. BLACKSHERE, Appellant.

Presumption of Payment: FAILURE TO SUE AND ATTACH. An instruction, in an action on a claim due for many years, that, though defendant was a non-resident, his land at plaintiff's residence could have been subjected to payment, and therefore a presumption of payment arose from delay in suing, is properly refused, since such land could only have been reached by attachment suit, in which a bond is required.

FAILURE TO OBJECT. The failure of a seller in a bill of sale to object to the transfer of the possession of the goods from one agent of the buyer to another has no tendency to disprove his claim that the sale was on a credit and that it did not constitute a part of the consideration for the cancellation of notes and mortgages held by the buyer against him, in addition to the revenues of the land subject to the mortgages.

Evidence: VALUE OF LAND. Evidence that the owner of land kept it on the market, for sale, from the time he purchased it, and as to the price for which he sold it, is inadmissible to show its value at the time of its purchase by him, in the absence of evidence to show what effort he made to sell the land or to find a purchaser.

SAME. Evidence of the value of land conveyed to a mortgagee in satisfaction of the notes and mortgages, is admissible on the question whether a bill of sale from the mortgagor to the mortgagee was upon an independent consideration or was part of the consideration for the cancellation of the notes and mortgages.

SUPERSEDED PLEADING. An original answer which has been superseded by an amended answer may be admissible in evidence as an admission of the facts alleged therein, subject to the right of the defendant to show that such facts were mistakenly or inadvertently pleaded.

102	366
129	563
102	366
139	301

Recitals in Bill of Sale: PRESUMPTION. An instruction that the giving of a bill of sale was presumptive evidence that the personalty sued for was paid for at the time of purchase and that the value thereof was the consideration stated, is properly refused where not all the personalty sued for was included in the bill of sale.

Appeal: REVIEW OF INSTRUCTIONS: Exceptions. No questions as to the giving of particular instructions is raised by a record showing that the court gave the "following instructions, which were duly excepted to by the defendant;" no exception being taken to particular instructions, or noted in the margin; and there being no claim that the charge, as a whole, is erroneous.

ASSIGNMENTS. No question is raised by exceptions to instruction taken by motion for a new trial within three days, as authorized by Code, section 2789, where the exceptions do not specify the grounds of objection as required by such statute.

EXCEPTIONS IN MOTION FOR NEW TRIAL. An assignment that the court erred in refusing to give certain numbered instructions, "and every one of them," is sufficient to present the refusal of each request, on appeal.

REVIEW OF VERDICT. The supreme court will not disturb a verdict if it is sustained by the evidence, although the court, sitting as jurors, might have reached a different result.

Appeal from Linn District Court.—HON. WILLIAM P WOLF, Judge.

SATURDAY, MAY 22, 1897.

PLAINTIFF, as assignee of James Adams, brings this action to recover the reasonable value of personal property alleged to have been sold by said Adams to the defendant in 1886. The record shows that the defendant has at all times since the sale been a resident of the state of Maryland. The answer is a denial that anything is due plaintiff. It is also alleged that plaintiff's said claim was paid to his assignor, Adams, in 1888; and, in another amendment, defendant pleads

that he paid for the property at the time of its purchase, and that a bill of sale for a portion of it was made by Adams to him, and avers that if any property was turned over to him which was not included in the bill of sale, the same was omitted therefrom by inadvertence. Plaintiff, in a reply, avers that the bill of sale was made for the purpose of conveying to the defendant the legal title to the personal property therein described, and the only consideration for it was the promise of the defendant to pay for said property, as well as for other personal property described in the petition, the reasonable value thereof. There was a trial to the court and a jury, which resulted in a verdict for the plaintiff in the sum of one thousand five hundred and fifty dollars and costs. Defendant appeals.—*Affirmed.*

Charles W. Kepler for appellant.

Charles A. Clark for appellee.

KINNE, C. J.—I. Adams owned four hundred and forty acres of land in Linn county, Iowa, upon which, in 1886, the defendant held mortgages in an amount exceeding ten thousand dollars. Adams admits he deeded this land to the defendant in satisfaction of these claims; and defendant claims that in consideration of his delivering up to Adams his notes, and satisfying the debt, Adams agreed to and did deed the land to the defendant, and also turned over to him,
1 as a part of the consideration, the personal property now in controversy. The only point of contention is as to whether the said personal property was turned over in part satisfaction of the mortgages, as is claimed by appellant, or whether it was so turned

over to the defendant on his agreement to pay the reasonable value of it. On cross-examination
2 the plaintiff sought to show by one Jordan, the agent of the defendant who had possession of this personal property, that when he turned it over to one Haines, who succeeded him as agent for the defendant, Adams made no objection to such transfer. Similar evidence was sought to be elicited from Haines. All of this evidence was excluded, and error is predicated upon the rulings with reference thereto. We think this evidence was properly excluded. On every theory of the case, the property had been sold and transferred by Adams to the defendant. Because, as Adams now claims, defendant had not yet paid him for the property, would be no reason for Adams to object to the placing of the same in the possession of another person as agent for the defendant. It continued in defendant's possession as before, and was just as available to Adams in satisfaction of his claim as if it had remained in the custody of Jordan. There was no reason, then, for Adams to say anything touching the matter of the change of custody from Jordan to Haines. Furthermore, the evidence of Jordan was properly ruled out as not proper cross-examination.

II. Complaint is made of certain rulings of the court upon the examination of Judge Thompson. While it would not have been improper to have permitted the judge to answer the questions objected to, still there was no abuse of the discretion vested in the court, because it appears that he had already, in substance, answered the same questions.

III. The court permitted the plaintiff to show the value of the land at the time the conveyance was made by Adams to the defendant, and these rulings are claimed to have been erroneous. While evidence

of the value of the land was not of controlling importance, it was proper to go to the jury upon the
3 question of the probability of the personal property having formed a part of the consideration of the payment of the mortgage debt, inasmuch as the direct evidence touching that matter was conflicting. *Johnson v. Harder*, 45 Iowa, 679; *Paddleford v. Cook*, 74 Iowa, 434 (38 N. W. Rep. 137); *Lumber Co. v. Smith*, 71 Wis. 304 (37 N. W. Rep. 412), and cases cited.

IV. The original answer of the defendant was introduced in evidence over his objection. This answer pleaded a payment for the personal property
4 long after its purchase. It may be that the allegations therein contained were not consistent with those made in subsequent amendments to the answer. If the original answer should be deemed to have been superseded by the amendments, still the original might be introduced in evidence; and, if the facts so pleaded had been mistakenly or inadvertently stated, the defendant had the right to explain the circumstances under which they were made. There was no error in the ruling. *Shipley v. Reasoner*, 87 Iowa, 556 (54 N. W. Rep. 470).

V. It is said that the court erred in refusing to permit the defendant to show that the land was on the market from the time he got it until he sold it, in 1894, and how long he kept it before he found a purchaser, and that twenty-seven dollars per acre
5 was the highest price he could get for it.

Whether or not the facts that defendant kept the land on the market, and found no purchaser, until 1894, and then sold it for much less per acre than the evidence of plaintiff's witnesses shows it was worth in 1886, are material, as tending to show the value of the land in 1886, would depend upon facts not sought to be put in evidence. Defendant did not offer to show

what, if any, effort he had made to sell the land or to find a purchaser. While, under a proper showing, the offered evidence might have been material, and should have been admitted, yet, in view of the circumstances under which it was offered, we think it was properly excluded.

VI. Appellant says the court erred in giving certain instructions to the jury. Appellee insists that we cannot consider the question sought to be raised,

as the record fails to show any proper exceptions to the giving of the instructions now complained of. The abstract of appellant shows that the defendant excepted to the giving of every one of the instructions in the charge of the court, at the time they were given. Appellee, in an amended abstract, says the only exceptions to instructions are found in the bill of exceptions, in the following language: "The court then, on its own motion, read and gave to the jury the following instructions, which were duly excepted to at the time by the defendant. No exceptions to any of the said instructions are noted on the margin thereof." Appellant, in a reply abstract, avers that the original abstract and appellee's amendment thereto constitute a full and complete abstract of the record. It then appears that the exceptions, as shown by the bill of exceptions, go to the charge of the court as a whole; and as it is not claimed that the entire charge is erroneous, and no particular instruction is excepted to, it is clear such an exception is insufficient to raise any question for our consideration. *McCaleb v. Smith*, 24 Iowa, 591; *Mershon v. Insurance Co.*, 34 Iowa, 88; *Cook v. Railroad Co.*, 37 Iowa, 426; *Bartle v. City of Des Moines*, 38 Iowa, 416; *Moore v. Gilbert*, 46 Iowa, 509; *Pitman v. Molsberry*, 49 Iowa, 339. Appellant contends, however, that within three days after the return of the verdict he filed his motion for a new trial, in

which he pointed out specifically his objections to the instructions. Section 2789 of the Code, provides: "Either party may take and file exceptions to the charge or instruction given, or to the refusal to give any instructions offered, within three days after the verdict, and may include the same in a motion for a new trial, but in either case the exceptions shall specify the part of the charge or instructions objected to and the ground of the objection." The statute, it will be seen, provides that when exceptions are taken to instructions after the verdict, and in a motion for a new trial, such exceptions must specify the part of the charge objected to, and must state the ground of the objection. If it be conceded that the exceptions in the motion for a new trial sufficiently specify the portion of the charge objected to, there can be no claim that the grounds of the objections are stated. We have read with care the motion for a new trial, and it nowhere states any ground of objection to a single instruction given. Such an exception is not in compliance with the statute, and we cannot consider the questions presented which are based thereon. That exceptions to instructions not taken when they are given must specify the ground of objection, is not only the requirement of the statute, but has been held to be the law in many decisions of this court. *Parsons v. Parsons*, 66 Iowa, 754 (21 N. W. Rep. 570, and 24 N. W. Rep. 564); *Hale v. Gibbs*, 43 Iowa, 380; *Stevens v. Taylor*, 58 Iowa, 664 (12 N. W. Rep. 625); *Stanhope v. Swafford*, 80 Iowa, 48 (45 N. W. Rep. 403).

VII. Error is assigned as follows: "The court erred in refusing to give and read to the jury instructions 1, 2, 3, 4, 5, and 6, asked by the defendant, and every one of them." Exceptions were taken to the refusal to give these instructions when they were asked and refused, and assignments like that above set out have often been held sufficient

as to instructions asked and refused. *Sherwood v. Snow*, 46 Iowa, 481; *Hammer v. Railroad Co.*, 70 Iowa, 624 (25 N. W. Rep. 246); *Koenigs v. Railroad Co.*, 98 Iowa, 569 (65 N. W. Rep. 314), and cases cited. The defendant asked six instructions which were refused.

There was no error in refusing them. The first
9 instruction was based upon the theory that the bill of sale raised a presumption that the personal property sued for in this action was settled for at the time, and that the consideration named in the bill of sale is presumptive evidence of the amount of the price agreed upon. Without expressing an opinion as to whether the instruction states the abstract proposition of law correctly, it would have been error, in any event, to have given it as worded, because it is not claimed that all of the personal property sued for in this action was embraced in said bill of sale. It was therefore misleading, and improperly assumed facts contrary to all of the evidence. The second and third instructions were properly refused. We think, under the holding in *Manning v. Meredith*, 69 Iowa, 430 (29 N. W. Rep. 336), that, had the second instruction omitted the reference to the defendant's ownership of the land, it might properly have been
10 given. The third instruction was faulty, in that it said that the court had jurisdiction over the defendant's property in Linn county for the purpose of subjecting it to the payment of plaintiff's claim, notwithstanding defendant was a non-resident. Under this feature of these instructions, if given, the jury might well have concluded that if the defendant was indebted to Adams, as the latter claimed, he (Adams) might at any time, by an ordinary suit have enforced his claim against the defendant's property in Linn county, and hence the fact that he did not do so would be presumptive

evidence that his claim had been paid. The fact that the property of the defendant (he being a non-resident) could only be reached and subjected to Adams' claim by process of attachment, would go far, we think, to negative any presumption as to the payment of the claim which might otherwise arise from the lapse of time, coupled with the ownership of the property, which might, as in case of a resident, be taken for the payment of the debt without resorting to the extraordinary process of attachment. Because one who has a just claim against a non-resident who owns property in the county of the claimant's residence does not resort to a suit by attachment to secure it, is no reason for holding that a presumption arises that his claim has been paid or satisfied. To sue out an attachment, one must furnish a bond, and the uncertainties of the litigation which might follow such action are such that a failure to so act should not be held to raise any presumption against the holder of the claim against such non-resident. The circumstances of Adams may have been such that he could not give an attachment bond, and, if so, and the instructions had been given, his poverty would have been the means,—indirectly, it may be,—of raising a presumption that his claim had been paid. The fourth instruction asked, in so far as it was correct, was covered by the charge of the court. The fifth instruction asked states that there was no evidence that the claim had been assigned by Adams to the plaintiff, and therefore the jury must find for the defendant. It was wholly immaterial whether or not the pleadings admitted the assignment of the claim, as the defendant proved said assignment by Adams himself. The instruction was therefore properly refused.

VIII. Finally it is insisted that the evidence does not support the verdict. Sitting as jurors, it

is likely we should have reached a different result; but there was a plain conflict in the evidence, and it was for the jury to say who they believed had stated the facts correctly. There was sufficient evidence to sustain the verdict, and we cannot interfere.—AFFIRMED.

J. A. BARRIS & COMPANY, Appellants, v. THE CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Carriers: RATES MADE BY RAILROAD COMMISSION: Damages. A shipper is not concluded, as to the reasonableness of shipping rates, by the schedule of rates adopted by the railroad commissioners under Acts Twenty-second General Assembly, chapter 28, section 17, providing that such schedules shall, in all suits brought against any railroad corporation doing business within the state wherein its charges for transportation of any freight are involved, be deemed, in all courts of the state, as *prima facie* evidence that the rates therein fixed are reasonable and just maximum rates, and the fact that the rates charged by the company do not exceed those fixed by the schedule does not prevent recovery of damages under section 9, as for overcharge. Distinguishing *McGrew v. Railway Company* (Mo. Sup.) 21 S. W. Rep. 463; *Sorrell v. Railway Company*, 75 Ga. 509.

Appeal from Pottawattamie District Court.—HON. N. W. MACY, Judge

SATURDAY, MAY 22, 1897.

DURING June, and up to July 20, 1893, the plaintiff firm shipped over defendant's line of road, in car-load lots, sand from different points in Iowa to Creston, Iowa, for which the company received payment. This action is to recover overcharges, being in excess of reasonable rates, it being averred that such excess is in the sum of three hundred and thirteen dollars and thirty-eight cents, the recovery being sought in three times that sum, under the provisions of chapter 28, Acts Twenty-second General Assembly. The answer

is a denial of excessive charges, and it is pleaded that the rates charged were those fixed by the board of railway commissioners of Iowa, because of which no cause of action accrued. Upon the trial, the district court gave judgment for defendant, and the plaintiff appeals.—*Reversed.*

Harl & McCabe and Spencer Smith for appellants.

Wright & Baldwin for appellee.

GRANGER, J.—The facts appear mainly by stipulation. The schedule of rates as provided by the board of railroad commissioners of this state, and in operation from 1889 to March 1, 1893, fixed the rate for sand the same as for soft coal. By a provision of the tariff rates that took effect March 1, 1893, the classification of sand was changed to class E, which gave it a higher rate. Because of a complaint to the commissioners, of which the defendant company had notice, on July 20, 1893, sand was changed to its former classification, with a rate the same as soft coal. The difference in the schedule rates between that of soft coal and class E which the company received makes the excess of charges for which this suit is brought, and hence it will be seen that the rates charged did not exceed the rates specified in the commissioners' schedule of rates. The district court found the rates charged to be actually unreasonable, but held that, as the rates charged did not exceed the schedule rates, there could be no recovery; and we are to determine the correctness of the holding as to the effect of the schedule rates. It is the provisions of chapter 28, Acts Twenty-second General Assembly, that give rise to plaintiff's cause of action, if it is to be sustained. Sections 2 and 9 of the act are as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property in this state, as aforesaid or in connection therewith or for the receiving, delivering, storage or handling of such property shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

"In case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing, in this act required to be done, such common carrier shall be liable to the person or persons injured thereby, for three times the amount of damages sustained in consequence of any such violation of the provisions of this act, together with costs of suit and a reasonable counsel or attorney's fee to be fixed by the court in which the same is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case; provided that in all cases demand in writing on said common carrier shall be made for the money damages sustained before suit is brought for recovery under this section and that no suit shall be brought until the expiration of fifteen days after such demand."

As there is no controversy over the question of fact as to the charges being unreasonable, considered independent of the act in question, if there is nothing in the act to affect the result, the sections quoted justify a recovery, for section 9 in terms creates a liability for doing any of the acts prohibited by the chapter, and section 2 in terms prohibits the taking of unreasonable rates. Section 17 of the act contains the following provision: "The board of railroad commissioners of this state are hereby empowered and directed to make for each of the railroad corporations,

doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of charges for the transportation of freight and cars on each of said railroads, and said power to make schedules shall include the power of classification of all such freights, and it shall be the duty of said commissioners to make such classification; provided, that the said rates of charges to be so fixed by said commissioners shall not in any case exceed the rates which are or may hereafter be established by law; and said schedules so made by said commissioners shall, in all suits brought against any such railroad corporations, wherein is in any way involved the charges of any such railroad corporation for the transportation of any freight or cars or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as *prima facie* evidence that the rates therein fixed are reasonable and just maximum rates of charges for the transportation of freight and cars upon the railroads for which said schedules may have been respectively prepared." We think it is nowhere claimed that the commissioners' schedule is intended to deprive the railway company of reasonable rates for transportation of freight; that is, if the schedule makes a rate that is less than reasonable, the company may recover the reasonable rate, and in any action by the company to recover a rate in excess of the schedule rate the only effect of section 17 would be to make the schedule rate *prima facie* reasonable, so that the company must overcome that effect by proof. The language of section 2 is that "all charges * * * shall be reasonable and just." It is no more restrictive than permissive. It fixes the rights of both parties by a re-enactment of the common law. Confessedly, section 17 does not operate to the prejudice of the company, if the commissioners shall err in judgment, and fix a rate less than what is reasonable. It seems

to us the section has the same force and effect as to both parties. If the commissioners err in judgment, and fix a rate too high to be reasonable, why should the shipper be required to pay it, or the company, if it receives it, be permitted to keep it? It will be seen that section 17, when carefully read, does not attempt to deal with facts or conditions that are conclusive, but those that are *prima facie* only. Largely, its office is to fix a rule of evidence. That is one of the purposes of the act, as indicated by its title. It is likely true that the purpose of the act, as to evidence, may have been intended more for proceedings before the commissioners than in courts; but it is equally true that it does fix a rule of evidence in courts. Some authorities are cited and relied on in support of appellee's position, which we should notice. The one apparently most relied on is reported in *Chicago, B. & Q. R. Co. v. People*, 77 Ill. 443. The statutes, so far as material, in that state and this, are so similar that a holding by that court to the effect that an observance of the schedule rate by the company would defeat a recovery for charges in excess of a reasonable rate would be a direct and high authority on the subject in this state. But, as we understand, a majority of the members of that court expressly dissent from such a conclusion. The opinion in that case, in which the conclusion of the majority is announced, deals only with such a question, barring, perhaps, a question of pleading. In that opinion the constitutionality of the act is not considered. Two members of the court dissent from the "reasoning of the opinion" which went to the proposition we are considering, and they "especially" dissent so far as the opinion may assume the constitutionality of the law. Their concurrence in the conclusion is placed, evidently, on the unconstitutionality of the law. Two of the other justices dissent from both the

reasoning and conclusion, so that but three members are left to concur in the reasoning of the opinion, being a minority. If the case can be said to be an authority on this particular question, we think it sustains our view; but it is probably fair to say that, because of the different grounds on which rest the different conclusions, the case is not valuable as authority. The rule of appellee's contention is sustained in a somewhat recent case in Missouri. *McGrew v. Railway Co.* (Mo. Sup.) 21 S. W. Rep. 463. That case is made to turn on certain provisions of the Revised Statutes of that state of 1889, the opinion citing some of the sections from 2631 to 2639. We have examined the statutes, and find no similar provision to ours as to the effect of scheduled rates. In section 2639 we find language to the effect that when rates are established in accord with the provision of the act it shall be unlawful for the carrier to receive either more or less than the established rate, except when specially permitted so to do. This particular language is not referred to in the opinion in the Missouri case, but that case cites *Sorrell v. Railway Co.*, 75 Ga. 509; and the Missouri case, speaking of the Georgia case, says it was decided "under a statute almost exactly like the statute under consideration, where a suit was brought against a railroad company on account of alleged overcharges beyond a reasonable rate. It was held that, as the declaration did not allege either that no rates had been fixed for the defendant road, or that the charges were beyond the rates so fixed, it was demurrable." The statute of Georgia (Code, section 719f) provides that the schedule shall "be deemed sufficient evidence that the rates therein fixed are just and reasonable rates." The court, in its opinion, after citing the statute, says: "Thus the statute law of the state fixes, through commissioners appointed therefor, just and reasonable

rates of freight, and makes these schedule rates evidence, and sufficient evidence, of the justness and reasonableness of the freights exacted by the railroad companies in all the courts of this state." It will be seen that the statutes in which the rulings were made in Missouri and Georgia are so unlike ours as to make the holdings therein of no force in construing ours. These are the only authorities cited on this question from any court of appeals. With the language of our statute, we are not in doubt as to a proper conclusion. It would seem to be a strange construction to so construe the language of the law as to make the schedules but *prima facie* as to the carrier and conclusive as to the shipper. Equality before the law is the correct rule, and should obtain in the absence of a clear legislative intent to the contrary.

Appellant has discussed the right to recover triple damages. Appellee has not discussed that proposition, and, indeed, there seems to be but little room for discussion under the language of the law. The right to such damages seems to follow a right of recovery. The judgment is REVERSED.

FANNIE FINCH, JAMES LAMB, and W. G. HARVISON,
Appellants, v. HARRIETT GARRETT, HENRY LAMB,
CASPER LAMB, IRA LAMB, ORRIN LAMB, ROSANNA
LAMB, and FLORENCE MARICLE.

102	381
114	445
102	381
115	262
102	381
126	714

Advancements: CONSTRUCTION OF STATUTE. The word "now" in

- 1 Code, section 2459, providing that property given by an intestate
- 3 by way of an advancement to an heir, shall be considered a part of the estate so far as regards the distribution thereof, and shall be taken by the heir towards his share at what it would "now" be worth, if in the condition when the gift was made,—refers to the time of distribution, and not to the date of the passage of the act.

Evidence: PAROL VARIANCE OF DEED: Advancements. Parol evi-

- 2 dence is admissible to show that the deed from a parent to a child, expressing a valuable consideration, was in fact voluntary, where

the purpose is to show *that the conveyance was an advancement to the child, and not to avoid the deed.*

PRESUMPTIONS. A voluntary conveyance by a parent to a child is

- 1 presumed to be an advancement, and the burden of showing that
- 3 it is not, is on the person claiming that it was not so intended.

DECLARATIONS OF GRANTOR. Declarations of grantors in disparage-

- 5 ment of their title, when made before their conveyance, are admis-
- sible against their grantee.

Innocent Purchaser: ADVANCEMENTS. Where, pending partition, one

- 1 defendant purchases the interest of the others, having notice that
- 5 plaintiffs were claiming that advancements had been made by the common ancestor of his grantors, he takes the land subject to set-off on account of these advancements.

Partition: ATTORNEY FEES. McClain's Code, section 4532, which

- 7 authorizes the taxation of an attorney fee in partition suits in which there is no contest, does not warrant the allowance of such fees in contested partition suits.

COSTS. Under McClain's Code, sections 4517, 4531, providing that

- 8 when issues are joined in partition the question of costs must be determined as in other suits, where plaintiffs plead advancements made to defendants, which defendants deny, and finding is made for plaintiff, costs in the lower court, after filing defendants answer, should be taxed to them.

Appeal from Polk District Court.—HON. T. F. STEVENSON, Judge.

MONDAY, MAY 24, 1897.

SURT in equity to partition certain real estate of which one Newton Lamb died seized. Some of the defendants pleaded advances made by their ancestor to the plaintiffs and the other defendants, and they asked that these advancements be taken into account in making the partition. The lower court found that certain advances had been made, and passed a decree accordingly. Plaintiffs appeal.—*Modified and affirmed.*

E. J. Goode and W. G. Harvison for appellants.

Dudley & Coffin and B. F. Maricle for appellees.

DEEMER, J.—Newton Lamb died intestate on the twenty-first day of April, 1892, seized of the property in controversy. This suit is brought to partition the real estate among the children and heirs at law of the deceased and their grantees. Harriett Garrett and Florence Maricle, daughters, and Orrin Lamb, a son, claim that the other children each received twenty acres of land, without consideration, from their father during his lifetime; that the land so received by each of them would now be worth, if in the condition when given, the sum of one thousand eight hundred dollars; and that the same should be treated as an advancement in the distribution of his estate. It is admitted that in March, 1871, Lamb conveyed twenty acres of land to each of his two sons, Casper and Henry, and that the consideration expressed in the deeds was one hundred dollars for each tract. It is also admitted that in October, 1873, he conveyed forty acres of land to his son James Lamb, the expressed consideration in this deed being eight hundred dollars. It is further admitted that in March, 1882, he deeded to his son, Ira Lamb, and to his daughter, Fannie Finch, each, twenty acres of land, and that the expressed consideration in these deeds was eight hundred dollars and love and affection. While this action was pending, W. G. Harvison purchased the interests of Henry and Casper Lamb in the estate of their father, and joined with Fannie Finch, whose attorney he had theretofore been, in this suit. James Lamb also joined as plaintiff. Of the defendants named none appeared save Mrs. Garrett, Mrs. Maricle, and Orrin Lamb, and these three asked that the several conveyances above mentioned be charged to each of the children who received them

as advancements to the extent of one thousand eight hundred dollars each, and that the land be considered a part of their ancestor's estate in the division and distribution of the property. Plaintiffs took issue with the defendants named on their plea of advancements, and on these issues the case was tried in the court below, resulting in a decree finding that these conveyances were advancements, and that the parties who received them should be charged with one thousand six hundred dollars in the distribution of the estate. The trial court further ordered that the cost should be paid out of the proceeds arising from the sale of the property, and refused to allow the defendants attorneys' fees.

Appellant's first contention is, that parol evidence is not admissible to show that the deeds from Lamb to his children were wholly without consideration, and they rely upon the well known rule that, when a
2 deed expresses a consideration, parol evidence is not admissible to prove there was none, for the purpose of avoiding it. The defect in the argument is, that it assumes that parol evidence as to consideration was adduced in this case for the purpose of avoiding the deeds. No such thing was attempted. Appellees did not adduce this evidence for the purpose of destroying these deeds. They do not attempt to set them aside; nor do they claim that they are invalid. On the contrary, they insist that the deeds are valid, but they claim that the property was given by way of advancement, and should be taken into account in distributing the estate. This is quite different from an attack upon the deeds themselves. The exact question here presented has never, so far as we are able to discover, been before this court. But the undoubted weight of authority sustains the admissibility of such evidence. See *Bruce v. Slemp* (Va.) 4 S. E. Rep. 692, and cases cited; 2 Devlin, Deeds, sections 829, 830; *Meeker v.*

Meeker, 16 Conn. 383; 1 Jones, Real Prop., sections 295, 301; Browne, Par. Ev., page 289. Evidence is abundant that all these deeds, except the one to James Lamb, were without consideration, and were intended either as gifts or advancements to the grantees named. With reference to the deed to James Lamb, it clearly appears that there was no consideration for twenty acres of the land conveyed to him.

3 Now, the rule is well settled in this state, that a voluntary conveyance from parent to child, is presumed to be an advancement, and the burden of showing that it is not, is upon the person who claims that it was not so intended. *Phillips v. Phillips*, 90 Iowa, 541 (58 N. W. Rep. 879), and cases cited. Appellants have not met this burden, and we therefore hold that each of these conveyances, to the extent of twenty acres, was an advancement to the grantees named.

Appellant Harvison purchased the interest of Henry and Casper Lamb in and to the estate of their father, November 1, 1893, more than a year after the death of the ancestor, and about nine months

4 after the commencement of this suit, and took from each of them a deed of special warranty for an undivided one-ninth of the premises; the deeds reciting that it was the intent of each of the grantors to convey all their right, title, and interest in and to the estate of their deceased father. Harvison claims that, as purchaser of the interest of these heirs, his estate is not subject to offset on account of these advances. We need not consider whether Harvison, as an innocent purchaser of the interest of these heirs, would have any other or greater rights than his grantors, for the reason that it affirmatively appears that he had notice before he made his purchase that the heirs were claiming advances had been made by the common ancestor to his grantors. Having this

knowledge, he cannot be deemed an innocent purchaser of the land.

Further claim is made that the evidence by which the advances are attempted to be proven comes from witnesses who are not competent to testify by reason of the provisions of section 3639 of the Code. The testimony of some of appellees' witnesses with reference to communications from and transactions with their father was clearly inadmissible, but enough remains which is confessedly competent to establish the advancements claimed. Ira Lamb, Fannie Finch, Henry Lamb, and Casper Lamb each admitted that the lands conveyed to them were without consideration, and all but one of them say that they were given as an advancement. Presumption comes to the aid of appellees as to this other, and there can be no doubt that the conveyances to these parties were intended as advancements, without reference to the incompetent testimony admitted. That the conveyance to James Lamb was intended as an advancement is also established by a fair preponderance of the competent evidence. It is said, however, that declarations made by Henry and Casper Lamb in disparagement of their title are not admissible as against Harvison. These declarations, or those which we think were competent, were made before their conveyances to Harvison, and under well-known rules they were admissible. 1 Greenleaf, Ev., sections 189, 109, and cases cited; *Ross v. Hayne*, 3 G. Greene, 211; *Wilson v. Irish*, 62 Iowa, 260 (17 N. W. Rep. 511); *Hurley v. Osler*, 44 Iowa, 642; *Robinson v. Robinson*, 22 Iowa, 427. In this connection it must be remembered that Harvison is not a good-faith purchaser from these parties. Their declarations, while they held title and were in possession, are clearly admissible.

5 petent evidence. It is said, however, that declarations made by Henry and Casper Lamb in disparagement of their title are not admissible as against Harvison. These declarations, or those which we think were competent, were made before their conveyances to Harvison, and under well-known rules they were admissible. 1 Greenleaf, Ev., sections 189, 109, and cases cited; *Ross v. Hayne*, 3 G. Greene, 211; *Wilson v. Irish*, 62 Iowa, 260 (17 N. W. Rep. 511); *Hurley v. Osler*, 44 Iowa, 642; *Robinson v. Robinson*, 22 Iowa, 427. In this connection it must be remembered that Harvison is not a good-faith purchaser from these parties. Their declarations, while they held title and were in possession, are clearly admissible.

Complaint is made of the valuation fixed by the court, of these advancements. It seems that it valued them all at one thousand six hundred dollars. Appellants contend that they should not be considered at more than eight hundred dollars, for the reason that none of these tracts were worth more than that sum at the time the conveyances were made, and for the further reason that the father intended that the children who received them should be charged with no greater sum. This whole matter is regulated by statute (Code, section 2459), which is as follows: "Property given by an intestate by way of advancement to an heir shall be considered part of the estate so far as regards the distribution thereof, and shall be taken by such heir towards his share of the estate at what it would now be worth if in the condition in which it was so given to him." Generally speaking, the rights of heirs are determined and computed from the death of the ancestor, and the word "now," as used in this statute, must either have reference to that event or to the time when distribution is actually made. Looking to the whole chapter of the Code in which this section appears, it seems to us that the word "now" refers to the time of distribution, which in this case was the time the partition suit was tried. To interpret the word as meaning the date of the passage of the act, as contended for by appellants, would make the statute inequitable and unintelligible, and would furnish so uncertain a rule to be applied to such cases, that we cannot adopt it.

Appellants further contend that the statute means that advancements shall be valued at what the property was worth at the time it was given to the heir. We do not think this was the legislative intent. If it was, very queer language was selected by which to express it, for, the statute says that the advancements

should be considered a part of the estate and be taken by the heir towards his share of the estate at what it would *now* be worth if in the condition in which it was so given to him. This gives us a fair and equitable rule. The favored heir has the use of the advancement from the time it is given until distribution, without charge. He is preferred above the other heirs to this extent, and the law wisely says that, as such gift is made to the heir in anticipation of his share in the estate, and is to be taken into account in making distribution, it shall be considered a part of the estate, and taken by such heir towards his share at what it would now be worth if in the condition in which it was when given to him. The statute is plain and unambiguous, and there is no room for construction except as to the word "now," and the context clearly indicates that it should be given the meaning heretofore affixed to it. The lower court fixed the value of these advancements at one thousand six hundred dollars. There is abundant evidence to sustain this finding. Indeed, a greater valuation would not be without support; but we leave it as fixed by the lower court, believing that amount to be equitable and just.

There is no evidence in the case to sustain Harvison's claim of estoppel.

Appellees filed a motion to re-tax costs, and to tax attorney's fees. This motion was overruled, and they appeal from the ruling. The statute provides (McClain's Code, section 4532): "In all actions
7 for partition of real estate, where there is no defense made, no greater attorney fee shall be allowed by the court to be taxed for and as attorney fees in such action for partition than provided in section 2 hereof." Section 2 provides the amount to be taxed. We have heretofore held, in construing these sections, that attorney's fees should not be taxed in

cases where there is a contest. *McClain v. McClain*, 52 Iowa, 272 (3 N. W. Rep. 60); *Duncan v. Duncan*, 63 Iowa, 150 (18 N. W. Rep. 858). As there was a contest here, the court was right in refusing to tax such fees. As to the other costs, the statute (McClain's Code, section 4531) provides, "that all the costs of the proceedings in partition shall be paid in the first instance by the plaintiffs, but eventually by all the parties in proportion to their interests, except those costs which are created by contests above provided for." The contests above provided for relate to issues made by the pleadings, with reference to the respective interests of the parties; and it is further provided, in section 4517 of the same Code, that "issues may thereupon be joined and tried between any of the contesting parties, the question of cost, on such issues being

regulated between the contestants agreeably to the principles applicable to other cases." The 8 appellees in this case admitted the heirship of all parties, but further pleaded advancements made to appellants. Appellants denied these advancements, and on this issue the case was tried. Appellees succeeded, and, applying the rule applicable to other cases, it follows that all costs made in the lower court after the filing of defendants' answers should have been taxed to them, and the court below should have so ordered. The case of *Duncan v. Duncan*, *supra*, holds that issues, such as are here presented, make the contest referred to in the statute.

In all other respects the decree was correct, and it will be so modified as to tax all costs made after the filing of defendants' answer to the appellants.—
MODIFIED AND AFFIRMED.

THE PIONEER IMPLEMENT COMPANY V. THE STERLING
MANUFACTURING COMPANY, Appellant, Erroneously
Entitled THE STERLING MANUFACTURING COMPANY
V. THE PIONEER IMPLEMENT COMPANY.

Appeal: REVIEW OF EVIDENCE: *Transcript and abstract.* On appeal, errors assigned were that the court erred in taking all questions from the jury except one, in giving each of the instructions given on its own motion, and in overruling defendant's motion for a new trial. What was said concerning them in appellant's argument was based on the evidence. *Held*, that the contentions could not be considered where the abstracts conflicted without reaffirmance by appellant, and in the absence of a transcript of the evidence.

Appeal from Pottawattamie District Court.—HON. A.
B. THORNELL, Judge.

MONDAY, MAY 24, 1897.

THIS case is incorrectly entitled in the abstract, and consequently in the records of this court, as *Sterling Manufacturing Co. v. Pioneer Implement Co.*, instead of as above. It is an action by the Pioneer Implement Company, plaintiff, to recover of the Sterling Manufacturing Company, defendant, the value of a stock of agricultural implements of which plaintiff alleges it was the absolute and unqualified owner, and that said property was seized by the defendant, and converted to its own use, to plaintiff's damage. Issues were joined, the case tried to a jury, and verdict and judgment in favor of the plaintiff. Defendant appeals.—*Affirmed.*

John J. Shea for appellant.

Harl & McCabe and *C. C. McNish* for appellee.

GIVEN, J.—Appellant's original abstract does not contain any certificate or statement showing that it is a correct abstract of the record, or of any part thereof. Appellee filed an additional abstract "to correct some of the inaccuracies of appellant's abstract," and "expressly denying that both abstracts present or set out all the evidence introduced on the trial of said cause." Thereupon appellant filed an amendment to its abstract containing the following, and no more: "That the above and foregoing abstract contains all the evidence offered or received on the trial of said cause, the objections of the parties, the rulings of the court, the exceptions to said rulings, the instructions of the court and the exceptions thereto, the verdict, judgment, and all proceedings had and done in said cause, as fully as the same were had, done, or ordered." Following this, appellee served and filed its denial of appellant's amendment to abstract, as follows: "Appellee denies the statement in appellant's amendment to abstract that the abstract presents all the evidence introduced at the trial, and denies that said evidence is not presented in any or all of the abstracts and amendments, and denies that the pretended evidence set out in the abstracts and amendments is no part of the record in this cause." Appellant has not reaffirmed the correctness of its abstract, nor has any transcript of the evidence been filed. We are, therefore, without any authentic abstract of the evidence, and cannot consider any of the seventeen errors assigned upon the admission and exclusion of evidence.

The other errors assigned are as follows: "(18) The court erred in taking all questions in the case from the jury except the one of the value of the property in question, as shown on page 119 of this abstract. (19) The court erred in giving each of the instructions given upon his own motion. (20) The court erred in

overruling the motion of defendant for a new trial herein." These assignments are barely referred to in appellant's argument, and what is said concerning them is grounded upon the evidence. Without the evidence, we cannot consider these contentions. With this condition of the record, the judgment of the district court must be **AFFIRMED**.

**THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant, v. GEORGE HAYWOOD & SON,
GEORGE HAYWOOD, and MURRY HAYWOOD.**

Contract: CONSTRUCTION. A continuing contract for the sale of
1 ice, made August 8, provided that all money due to the buyer on re-sale of ice delivered to it on and after August 1 should be assigned to the seller for security, and that the seller was to furnish out of the money so assigned enough to pay freight on "the ice so furnished," not to exceed a certain sum per month. *Held*, that the contract did not require the seller to pay freight on the ice furnished after August 1, but before date of the contract.

Pleading: COUNTS. Where a petition by a carrier in one count sets
2 out a cause of action for freight charges under a contract of defendant with the consignee to pay them, the fact that it necessarily avers a shipment by defendant, and the amount of the freight charges thereon, does not authorize the presumption that it was intended thereby to state a second cause of action independent of the contract; and such pleading is not violative of Code, section 2646, requiring causes of action to be separately stated.

Appeal from Clinton District Court.—HON. W. F. BRANNAN, Judge.

MONDAY, MAY 24, 1897.

ACTION to recover four hundred and forty-three dollars and fifty-five cents as freight charges on twelve car loads of ice shipped from Clinton, Iowa, to Kansas City, Kan. After the evidence was introduced, the court directed the jury to return a verdict for

defendants, which was done, and judgment rendered thereon. Plaintiff appeals.—*Affirmed.*

Robert Mather and A. P. Barker for appellant.

Walsh Bros. for appellees.

LADD, J.—Between the second and sixth days of August, 1889, the defendants shipped twelve car loads of ice over plaintiff's road, consigned to the Kansas City Ice Company, and the freight charges for the transportation of this ice are claimed in this action. The petition is in one count, and is based on a written contract entered into by the defendants and the
1 partners composing the Kansas City Ice Company, August 8, 1889, whereby all moneys due such company for ice delivered on and after August 1, 1889, and from the government of the United States for ice, were assigned to defendants, but were to be collected by H. T. Carnahan and F. B. Lucas, of the ice company, and deposited to the credit of the defendants in the Exchange Bank, in Kansas City, Kan. Portions of the contract are as follows: "And that the same shall remain in said bank, subject to the draft or order of the said party of the second part [defendants], until all ice that has been heretofore or may be hereafter delivered by said parties of the second part to said parties of the first part shall be fully paid off, including expense they have been to loading," etc. "3d. It being understood that said parties of the second part shall, out of said money so collected, furnish sufficient money to pay the freight upon the ice so furnished, and pay the running expenses of said parties of the first part in the delivery and sale of said ice, not to exceed the amount of nine hundred dollars (\$900.00) per month. * * * And the parties of the second part hereby agree to and with

the said parties of the first part to deliver them ice for the purpose of carrying on the business as above set forth in such quantities as may be needed from this day on during this season." The contract also provides that the business shall be carried on for the parties of the second part, and that the moneys collected shall belong to them; that the cost of ice to be delivered shall be one dollar and seventy-five cents per ton at the defendants' ice house in Clinton; and that after paying for the ice, the cost of running the business, the freight, and other expenses, anything remaining shall be the property of the parties of the first part (Kansas City Ice Company), as their salary for transacting the business. The district court excluded all evidence, except the contract referred to, on the ground that the defendants were not bound thereby to pay the freight charges in controversy.

I. It will be observed that the transportation of the ice occurred before the contract was made. Does it relate to freight on ice previously shipped? No ice was assigned to defendants,—only the moneys due on that already delivered. The second paragraph requires the application of all moneys collected, due defendants for ice heretofore or hereafter to be delivered by them. There would be some force in the contention of appellant that the provision for the payment of "freight upon the ice so furnished," contained in the third paragraph of the contract, referred to "ice heretofore or hereafter to be delivered," in the second paragraph, were it not for the limitation of the cost of freight and expenses of delivery and sale of ice to nine hundred dollars per month. The parties certainly could not have intended thereby to limit the cost per month in the past. The contract explicitly provides for the shipment of ice and transaction of business in the future, and we think the limitation in the cost of freight and expenses per month clearly refers to

transportation charges and expenses for sale and delivery thereafter to be incurred. The contract must be considered in its entirety, in order to deduce therefrom its true meaning, and, when so considered, such freight and expenses only appear to have been contemplated.

II. It is insisted by the appellant that evidence should have been admitted tending to establish the liability of defendants as consignors of the ice. This

is undoubtedly an afterthought. The contract
2 heretofore mentioned is made a part of the petition, and the claim based thereon is fully set out. It is true that the petition incidentally states that defendants "shipped and consigned to the Kansas City Ice Company, as aforesaid, twelve (12) car loads of ice, upon which the freight charges due the plaintiff therefor amounted to the sum of four hundred and forty-three dollars and 55-100 (\$443.55) dollars, no part of which has been paid." But this is an averment necessary to be made in order to recover on the contract. The petition is in one count, and the statute requires each cause of action to be stated wholly in a count or division by itself. Code, section 2646. If more than one cause of action is pleaded in a separate count or division, and no objection made, recovery may be had on all, but in such event it must appear that this was intended. Where the right of the recovery is based upon a written contract, as in this case, and the averment of facts constituting another cause of action is necessary to bring the remedy sought within the terms of the contract, then it will be assumed that only one cause of action was intended. In other words, parties are presumed to follow the requirements of statute in preparing their pleadings, and a single count or division of a petition will not be construed to state two causes of action unless the purpose of the pleader so to do clearly appears. *Aultman & Co. v. Goldsmith*, 84 Iowa, 547 (51 N. W. Rep. 43).

The part of the paragraph quoted contains the only reference to the liability of the defendants as consignors, in an elaborate petition, of seven paragraphs, setting out in detail the facts constituting the alleged right of action on the contract. The court correctly held that only one cause of action was stated.—**AFFIRMED.**

**B. F. HEINS V. PHILLIP WICKE, CATHERINE WICKE, and
THE IOWA STATE INSURANCE COMPANY, Appellants.**

Agreement to Keep Property Insured: WAIVER BY ASSIGNMENT OF
1 POLICY. At a sale of a lot, the owner took a purchase money
5 mortgage, providing that the purchaser should keep the building insured for the benefit of the mortgagee. The vendor assigned to the vendee a policy of insurance. *Held*, that the assignment of the policy was made to preserve the insurance, and the obligation of the mortgagor to keep the property insured was not waived by such assignment.

ESTOPPEL BY ASSIGNMENT OF POLICY. The assignment of a policy
6 of insurance by the grantor to the grantee of the insured property does not estop the former to assert his equitable lien to the proceeds of the policy, under a covenant in a purchase money mortgage that the mortgagor will keep the property insured for his benefit, against the assignee of the policy after a loss who had actual notice of the mortgage and covenant and of the mortgagee's claim thereunder.

BY ASSIGNING POLICY TO MORTGAGOR. The assignment of a policy
5 of insurance by the grantor to the grantee of the insured property does not operate to release the equitable lien of the former upon the policy or its proceeds, under a covenant of a purchase money mortgage that the mortgagor will keep the property insured for his benefit.

WAIVER BY PERMITTING SUIT ON POLICY. A mortgagee is not
9 estopped to claim the proceeds of an insurance policy taken out by the mortgagor for his benefit, because he permitted the assignee of the policy to sue thereon, where he intervened in such suit, and the intervention was dismissed at the request of the assignee.

SHARING EXPENSE OF SUIT. A mortgagee who receives most of the
10 proceeds of a policy of insurance on the insured property, should bear with the assignee of the policy, whose rights are subordinate to his own, part of the expense incurred by her in an action in

which she recovered the proceeds of the policy and made them available to the mortgagee.

EQUITABLE LIEN ON INSURANCE MONEY: *Innocent purchaser.* A mortgagee of insured property whose mortgage contains covenants that the mortgagor will keep the property insured for his benefit, has an equitable lien upon the proceeds of a policy of insurance on the property, as against an assignee of the policy after a loss, who knew of the mortgage and the covenant and his claim thereunder, and is entitled to a personal judgment against the latter, who has received the full proceeds of the policy, to the extent of such equitable lien.

ADJUDICATION BY FORECLOSURE. A decree of foreclosure is not a bar to an action by the mortgagee to be subrogated to the rights of the assignee of an insurance policy on the property, after the loss, under a judgment against the insurance company, where it does not appear that the right to the insurance was litigated in the foreclosure suit.

Judgment: DEFAULT. A judgment by default, under the statutes, for failure of the defendant to appear and answer at the return term of the original notice, must be confined to the specific relief prayed for in the original petition, in the absence of a general prayer for relief, and its scope cannot be enlarged by the filing of an amendment to the original notice and petition, which is not served upon the defendant.

SHOWING OF MERITS: *Payment to clerk.* A judgment debtor who, in response to the request of a third person who claims the benefit of a judgment, pays the amount thereof to the clerk of the court, who subsequently turns the same over to the judgment creditor, is released from liability to such third person who had ample opportunity to notify the clerk of his claim, although the judgment debtor does not notify the clerk thereof.

Appeal from Linn District Court.—HON. WILLIAM P. WOLF, Judge.

MONDAY, MAY 24, 1897.

THE following facts appear from the pleadings and evidence: November 18, 1887, the defendant the Iowa State Insurance Company, issued its policy of insurance for one thousand five hundred dollars upon a store building in Fairfax (afterwards called Vanderbilt), Linn county, Iowa, to Joseph

Zabortskey. September 4, 1888, the property was sold to H. E. Smalley, and the policy assigned to him, and the assignment indorsed upon the policy. September 11, 1888, Smalley sold the property to E. Z. Bontty, and the policy was assigned to him, which assignment was indorsed upon the policy. December 29, 1888, Bontty sold the property to the defendant, Philip Wicke and assigned the policy to him; said assignment being indorsed upon the policy, and consent given by the company. Bontty's assignment read: "I hereby assign to Philip Wicke the policy of insurance within written, subject to all liabilities, and entitled to all rights and privileges to which I am liable and entitled by virtue thereof." December 29, 1888, when Bontty made his sale of the lot to Wicke, he took a purchase-money mortgage from said Wicke securing a note of same date for one thousand two hundred dollars, which bore interest at eight per cent. annually. One provision of said mortgage was to the effect that said Philip Wicke was to "keep all buildings on said premises constantly insured for two-thirds of their value in good and satisfactory insurance company for the benefit of the mortgagee." That said mortgage was filed for record December 31, 1888, and duly recorded. September 10, 1890, said buildings were destroyed by fire, and that the mortgage debt was and still is unpaid. That the policy heretofore mentioned was the only insurance upon said property when said mortgage was given, as well as since said time. October 4, 1890, said Philip Wicke made proof of loss under said policy, in which he mentions the mortgage upon said premises which he executed to Bontty. Thereafter the defendant the insurance company demanded additional proof of loss. This demand was made after the company knew of the existence of the mortgage. The value of the lot, irrespective of the building insured, is a matter of contention; it being given

by witnesses from two hundred and fifty dollars to seven hundred dollars. February 2, 1891, Philip Wicke made an assignment of said policy to the defendant Catherine Wicke, as follows: "For value received, I hereby sell, transfer, and assign unto Catherine Wicke all my claim and cause of action against the Iowa State Insurance Company by reason of loss under policy No. 32,293, issued by said company on the twenty-first day of December, 1887, to Joseph Zabortskey, and assigned to me before said loss; authorizing her to sue for, recover, receive, and receipt for all money due from and owing by said company under and by virtue of such loss and policy of insurance." The defendant insurance company was notified of the existence of the mortgage and of the plaintiff's claim to the insurance money, prior to the time Philip Wicke assigned said policy to Catherine Wicke. Catherine Wicke knew of the mortgage long before she took the assignment of the policy. It is claimed, and there is evidence tending to show, that Catherine Wicke had actual notice of the plaintiff's claim to the insurance money prior to taking the assignment of the policy, though as to this the evidence is in conflict. The insurance company refusing to pay the loss on the ground that the property was incumbered by mortgage in violation of the terms of the policy, Catherine Wicke brought suit on the policy, and recovered a judgment in the district court on November 17, 1891, which was affirmed by this court on January 22, 1894. 90 Iowa, 4 (57 N. W. Rep. 632). Plaintiff in this case intervened in the suit by Catherine Wicke upon the policy, and claimed the proceeds of the policy under his mortgage, but finally withdrew, and dismissed his intervening petition, without prejudice. October 22, 1891, and before Catherine Wicke had obtained a judgment against the insurance company, plaintiff commenced

this action. The claim in the original petition was that plaintiff be subrogated to the judgment rendered in favor of Catherine Wicke, and he prayed for a decree against Catherine Wicke and the insurance company, subrogating him, to the amount of his mortgage, in the judgment rendered on said policy. There was no prayer for general relief. The original notice served upon the company asked the same as the petition, and expressly stated that "no other additional judgment is sought than to be subrogated to the right of Catherine Wicke in and to said judgment." The insurance company did not appear or answer this petition. The petition was amended, the last amendment being filed after default had been entered against the company. In this amendment plaintiff pleaded that the company had paid the money into court in disregard of his rights; that Catherine Wicke had drawn the same; and he asked and obtained a personal judgment against the insurance company and Catherine Wicke. Catherine Wicke appeared and answered in said suit. She admitted the execution of the note and mortgage, set out the assignment made by Bontty to Philip Wicke and from the latter to herself, that she paid a valuable consideration therefor, that she had no knowledge of any interest claimed by Bontty in the policy of insurance, and that plaintiff was estopped from having or claiming any interest in said policy adverse to her, and denied all other allegations of the petition. Plaintiff, in a reply, admitted the assignment by Bontty, but averred that it was made only to transfer the legal title to Philip Wicke, and that the defendant took the policy with knowledge and notice of the rights of plaintiff's assignor, and after notice to the debtor, the insurance company, of the rights and claims of plaintiff's assignor. Afterwards plaintiff amended his petition, pleading the recovery of the judgment by Catherine Wicke against

the insurance company; that he had recovered a judgment on the note and for a foreclosure against Philip Wicke, for one thousand six hundred and seventy-eight dollars and seventy-two cents and attorney's fees and costs, and that the real estate was worth not more than two hundred dollars; that the Iowa State Insurance Company paid the full amount of the judgment which had been rendered against it to the clerk of the Linn district court, and said Catherine had, without authority of law, drawn said money. He asked that his rights to the proceeds of said policy might be established as superior to the rights of said Catherine, that the decree of foreclosure be extended to the proceeds of said policy, and for judgment against Catherine Wicke and the insurance company. Catherine Wicke answered said amendment, pleading that the mortgaged property, after the fire, was worth seven hundred dollars, and denied, in substance, all the allegations of the amendment. Afterwards she amended, pleading the incumbrance in violation of the terms of the policy; that a prior action had been brought by the plaintiff against Philip and Catherine Wicke in said court to foreclose said mortgage which proceeded to judgment and decree, and that such action estops plaintiff from maintaining this action. July 9, 1894, plaintiff again amended his petition, averring the payment of the money by the insurance company, and asking a personal judgment against Catherine Wicke and the insurance company. There was a denial by Catherine Wicke. The court entered a judgment against Catherine Wicke and the insurance company for one thousand five hundred dollars, and both parties appeal. Because the court did not render a judgment in plaintiff's favor for the full amount he claimed to be due to him, he appeals. August 19, 1895, the Iowa State Insurance Company filed a motion to set aside the default entered against it, which was overruled,

and from this ruling it also appealed.—*Affirmed* on appeals of plaintiff and Catherine Wicke, and *reversed* on appeal of insurance company.

Rickel & Crocker for appellant Catherine Wicke.

H. Scott Howell & Son for appellant Iowa State Insurance Co.

Heins & Heins for appellee.

KINNE, C. J.—I. We will first consider the appeal of the Iowa State Insurance Company. From the facts already set forth it appears that the insurance company did not appear in this case in the district court, nor did it in fact file any pleading therein. It was defaulted because it failed to appear and defend 2 in the action. Now, said company, having been served with notice that subrogation to the fund to be paid in on the judgment before rendered against it was all the relief asked, and the notice expressly stating that “no other additional judgment is sought than to be subrogated to the right of Catherine Wicke in and to said judgment,” it had a right to rely upon the fact that no other or further claim would be made against it in the suit, in the absence of notice of making another or additional claim. The company had no interest in the controversy between plaintiff and Catherine Wicks as to the appropriation of the fund due from it under said policy. It was immaterial to it who got the money, if its liability under the policy, and the judgment thereon, was fully and finally discharged. Therefore it could have had no interest in joining in the litigation between said contesting parties so long as no personal claim was made against it. Nothing is better settled than that where a defendant served with notice of a suit does not appear and answer, but makes default, no decree or judgment

can be entered against such defendant granting relief not specifically prayed for, or which is not clearly within the contemplation of a general prayer for relief. The default in such case entitles the plaintiff to recover only to the extent of the relief sought in the petition. *Johnson v. Mantz*, 69 Iowa, 710 (27 N. W. Rep. 467); *Byam v. Cook*, 21 Iowa, 392; *Lafever v. Stone*, 55 Iowa, 49 (7 N. W. Rep. 400); *Tice v. Derby*, 59 Iowa, 312 (13 N. W. Rep. 301); *Marder v. Wright*, 70 Iowa, 42 (29 N. W. Rep. 799); *Mickley v. Tomlinson*, 79 Iowa, 383 (41 N. W. Rep. 311, and 44 N. W. Rep. 684); *Worth v. Wetmore*, 87 Iowa, 62 (54 N. W. Rep. 56); *Shelley v. Smith*, 50 Iowa, 543; *Larson v. Williams*, 100 Iowa, 110 (69 N. W. Rep. 442); *Bosch v. Kassing*, 64 Iowa, 314 (20 N. W. Rep. 454). Under the original notice and the original petition filed in this case, and in the absence of an appearance by the defendant insurance company, the court had no jurisdiction to enter a personal judgment against it. There was no prayer for general relief; there was no prayer for a personal judgment against the company, and hence no basis, either in the notice or petition, for entering a personal judgment against the company. The situation was not changed by the filing of an amendment to the petition asking for a personal judgment. No further notice was served upon the company. It was not advised that any such relief would be claimed, but, on the contrary, in the only notice served upon it it was told that no relief was, or would be, sought against it, save that plaintiff be subrogated to the rights of Catherine Wicke in and to the policy and the judgment in her favor. We think appellee's argument is a confession that if the insurance company did not appear and answer, the court had no right to enter a personal judgment against it, but, whether it so confesses or not, it is certain from the record before us that the company did

not in fact appear, and did not file an answer in the case. The personal judgment against it was therefore unwarranted.

II. Did the court err in refusing to set aside the default and judgment entered against the insurance company? Code, section 3159, provides: "The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered." Appellee contends that no valid defense was shown, therefore the ruling of the court refusing to set aside the default was right. From the showing to set aside the default, as amended, it appeared that the company, on June 5, 1895, paid to the clerk of the district court of Linn county the full amount of the judgment rendered against it on said policy of insurance; that plaintiff had intervened in said suit; that afterwards he withdrew his petition of intervention, with the consent of the parties to the suit; that at said time he asked the attorney for the company if they would pay the money into the hands of the clerk of the court, in case judgment was obtained in said cause, and was assured that they would do so; that he informed said attorney that he intended to bring suit against Catherine Wicke and the insurance company, asking to be subrogated to the rights of Wicke Bros. under the policy, and stated that if he did not, he would take no advantage of the company if they would pay the money to the clerk. February 11, 1892, the attorney for plaintiff wrote the company, inclosing an original notice, and asking an acceptance of service thereof. In this letter he said: "While I have not much hope in this matter (for I think the case will be reversed), yet, if it should stand, I wish to be in shape to compel the Wickes to do what is right by us." The company accepted service of the notice. March 9, 1892, the company sent to the clerk of the

district court of Linn county, Iowa, an answer, pleading that the company had been sued upon two policies by Catherine Wicke; that the case was undetermined, and asking the court to protect the company in its rights, and offering to pay any sum of money that might be found due Catherine or Philip Wicke into the hands of the clerk of said court; that it asked said clerk to file said answer in the case of Heins against Wicke, but it was never filed in this case. February 17, 1894, the attorney for plaintiff wrote the company as follows: "I learn that the case of *Wicke v. State Insurance Co.* has been affirmed by the supreme court. I wish, therefore, to remind you of the case that is still pending in the district court of Linn county, entitled '*B. F. Heins v. Philip Wicke, Iowa State Insurance Co., et al.*,' seeking to subrogate the mortgage to the proceeds of the said policy. You will remember that notice was served on you, and you appeared in the case and answered. The money will therefore better be paid to the clerk of the district court for such disposal as the court may decide and direct." The company answered: "Yes. What money we will have to pay in the Wicke case we will pay to the clerk of the district court." The showing also is that the original notice and petition did not refer to any claim for a personal judgment against the insurance company, and nothing was asked except that the plaintiff be subrogated to the rights of Catherine Wicke to the insurance money, and that afterwards, without notice to said company, the plaintiff amended his petition, setting up a new cause of action not warranted by the notice or petition, which said amendment did not come to the notice of the company until August 8, 1895; that after the money had been paid to the clerk a judgment was rendered in said action for it against the company in favor of plaintiff. The company aver that the default

and judgment was wrongfully entered by fraud and misrepresentation and irregularities, and
4 without disclosing to the court the facts. Appellee's claim is that, because the company did not instruct the clerk of the court to whom it paid the money in satisfaction of the judgment, to hold the same until the court should determine who was entitled to it, it paid said money in disregard of plaintiff's rights, and should be compelled to pay it a second time. The contention is based upon the claim that the company, before it paid the money, had notice that plaintiff claimed the same. Let it be conceded that the company had such notice. Does that interfere with its right to pay the money to the clerk of the court in discharge of a judgment which had been rendered against it? We think not. True, it might not, with such notice, pay the money to the other claimant of it. But in paying to the clerk it was discharging its obligation in a legal way, and it clearly had a right to so pay, unless it had done something to mislead the plaintiff into the belief that if it did so pay it would tie the money up in the clerk's hands by conditions attached to his paying it out. The suggestion in the letter of appellee's attorney to pay the money into court was followed by the company. The words of the letter, "for such disposal as the court may decide and direct," did not require the company to undertake to hold the money in the clerk's hands until the contest between appellee and Catherine Wicke should be determined. Appellee knew the company would pay the money to the clerk in satisfaction of the judgment. He had ample opportunity before it was so paid, to have taken the necessary steps to have kept it in the clerk's hands until such time as it was judicially determined to whom it should be paid. He did not do so. It was no part of the company's duty to take steps to hold the money in the

hands of the clerk. They paid it to that officer in satisfaction of the judgment, as they had a right to do, and there is no reason in law or equity why they should be compelled to pay a second time. We think there was a good defense shown, and that the court erred in refusing to set aside the default. As this view disposes of the case so far as the insurance company is concerned, we need not consider other reasons urged for a reversal of the judgment and decree as to it.

III. As to the appeal of Catherine Wicke. This appellant contends that, inasmuch as Bontty assigned the policy of insurance to Philip Wicke, it operated to release any equitable lien Bontty might otherwise have had in the policy or its proceeds, by virtue
5 of his mortgage. We do not think so. As there was a sale of the property, the buildings upon which were insured, such sale would vitiate the policy unless it was assigned to the purchaser with the consent of the company. Now, we find that the mortgage and assignment of the policy were all executed as a part of one and the same transaction. The mortgage provided that the mortgagor should keep all of the buildings constantly insured. This was a covenant which would only be discharged by having the insurance alive at all times during the life of the mortgage. In view of this obligation upon Philip Wicke it is obvious from all of the evidence and circumstances that the assignment of the policy was made to preserve the insurance, and that the obligations assumed by the mortgagor to keep the property insured were in no wise waived or released by such assignment.

IV. Appellant claims that the assignment by Bontty to Philip Wicke estops plaintiff from recovering the amount of the loss of Philip Wicke's assignee, Catherine Wicke. Under the evidence there is no

doubt that Catherine Wicke had actual notice of the Bontty mortgage long prior to the time she took
6 the assignment of the policy from her son, Philip Wicke. Whether she had actual notice at the same time of the provision of the mortgage touching the insurance, and of Bontty's and his assignee's claims thereunder, is a matter as to which the evidence is in conflict. Without stopping to point out the reasons for our conclusion, we may say that we think she did have actual notice of the insurance clause in the mortgage, and of the claim of Bontty and his assignee thereunder, prior to the time she took the assignment of the policy. She was not, therefore, misled by either the acts or silence of the appellee and his assignor. She voluntarily made the purchase of the policy, knowing that the appellee or his assignor made a claim to its proceeds by virtue of the insurance clause in said mortgage. The necessary elements of an estoppel are wanting.

V. Appellant places much reliance upon his plea of former adjudication. It seems that appellee commenced and prosecuted an action for the foreclosure of his mortgage, and obtained a judgment and
7 decree thereon, prior to the judgment and decree in the action at bar, and it is said he cannot now maintain this action based upon the same mortgage. To be a bar, a judgment must be between the same parties or their privies, and must equally bind both parties in the case in which an estoppel is claimed. The very question in issue in the present case must have been involved in the former action, and have been determined therein. *Woodward v. Jackson*, 85 Iowa, 432 (52 N. W. Rep. 358), and cases cited. The plea of former adjudication is denied, and substantially the only evidence touching the matter is the decree entered in the former case. From it it does not appear that the matter now litigated was involved

in the former action, nor that the parties were the same, nor that the present parties were in privity with those in the former action. Nor do we think that, as a matter of fact, the former action if shown to have been between the same parties or their privies, would bind the present parties as to the matter now in controversy.

VI. It is insisted that plaintiff has no right to subrogation as against Catharine Wicke, and hence is not entitled to a personal judgment against her. We

8 have no doubt that plaintiff had an equitable lien upon the fund, which might be recovered by Catherine Wicke from the insurance company, to satisfy which so much of the proceeds of said policy as might be necessary should be thus applied. Such being plaintiff's right, and said Catharine Wicke having received the full proceeds of said policy, we discover no reason for holding that he is not entitled to a personal judgment against Catherine Wicke. Nor do we regard it as of any importance that this policy was in existence upon the property prior to the sale of the real estate from Bontty to Philip Wicke. *Ames v. Richardson*, 29 Minn. 330 (13 N. W. Rep. 137), and cases cited; 1 Jones, Mortg., sections 400, 402, 403. In view of our finding that Catharine Wicke had actual notice of plaintiff's equitable lien before she purchased the policy, we are not called upon to determine as to whether or not the provision of the mortgage relied upon was a covenant running with the land.

VII. Appellant contends that plaintiff, by standing by and permitting Catherine Wicke to litigate for the recovery of the amount of the policy, in which suit she was successful, is now estopped from receiving the proceeds of the policy which have been
9 paid to her by the clerk. When Catherine Wicke instituted her suit against the company, she had an interest in the amount to be recovered, in

addition to the sum which would be necessary to satisfy plaintiff's equitable lien. It appears that in her suit against the company plaintiff intervened, and at her request afterwards withdrew his appearance and petition of intervention. Surely, under the circumstances, plaintiff is not estopped. That he failed to prosecute his intervention petition was due to Catherine Wicke's request. We discover nothing in this record upon which an estoppel can properly be predicated. We have considered all questions discussed by appellant which are deemed important, and find no ground for disturbing the judgment and decree rendered against Catherine Wicke.

VIII. As to the appeal of the plaintiff. The lower court entered a judgment in favor of plaintiff for one thousand five hundred dollars. At that time some one thousand eight hundred dollars was due upon plaintiff's judgment, and plaintiff insists that he should have had judgment for the full amount due. His mortgage covered the lot as well as the buildings thereon. He has a decree of foreclosure for the sale of the lot. Just what it is worth may be a matter of doubt, but plaintiff admits that its value is from two hundred dollars to two hundred and fifty dollars. It is true, the judgment and decree entered below in this case fail to show why the court reduced the amount of plaintiff's recovery from one thousand eight hundred dollars to one thousand five hundred dollars. While the record is not clear as to the value of the lot upon which the plaintiff's judgment is now a lien, still he admits it to be worth from two hundred
10 dollars to two hundred and fifty dollars. This amount was properly deducted from the amount of his recovery as against the proceeds of the policy. Again, it appears that Catherine Wicke was compelled to pay out a large sum of money in prosecuting the litigation upon the insurance policy. She reaps but

little benefit therefrom, and it is but just and equitable that plaintiff, who receives most of the proceeds of said policy, and was chiefly benefited by the litigation, should bear a part of the burden incident to the recovery of the fund. Just how much the court below reduced the amount of plaintiff's recovery on this account, does not appear, but it is apparent, considering the value of the lot, the amount of recovery on the policy, and the amount of the judgment rendered in plaintiff's favor, that he has no just cause of complaint. On plaintiff's appeal the judgment and decree below are **AFFIRMED**. On the appeal of Catherine Wicke the judgment and decree below are **AFFIRMED**. On the appeal of the Iowa State Insurance Company the judgment and decree below against it are **REVERSED**.

J. B. HATCHER V. JAMES DUNN, *et al.*, Appellants.

Oil Inspector: DUTIES MINISTERIAL. The liability of an inspector
1 of illuminating oil, whose duties are prescribed by statute and
2 rules and regulations adopted in accordance with statutory provisions, for injuries caused by insufficient testing of oil, is statutory.

FALSE BRAND: Error. Falsely branding illuminating oil, for which
2 the statute makes the inspector both civilly and criminally liable,
3 involves intentional falsehood, and not mere error or unintentional wrong.

Same. An inspector of illuminating oil is not liable for injuries
2 caused by the use of oil which he erroneously marks as of a certain test, if he has used instruments furnished and approved by
3 the proper authorities, and which he had no reason to believe were not in good order, and which he used with due care in the manner prescribed by law, although by reason of their use he erroneously marked the temperature at which the oil would flash too high—although his duties are purely ministerial, and though the statute makes him liable for “culpable negligence.”

DAMAGES: *Proximate-ness.* A state inspector of illuminating oil is
5 not liable for damages caused by the explosion of oil which has been tested by him and marked to flash at a temperature which is erroneously stated too high, if the explosion was not the result of the erroneous marking, but resulted from the use of an unsafe lamp.

Evidence: **ADMISSIBILITY OF CERTIFICATE:** *Thermometer variations.*

- 6 A certificate showing the variation of the scale of a thermometer from standard instruments, is properly admissible in evidence, together with the thermometer which it was made to accompany, in cases where the instrument itself is properly admissible.

Appeal from Linn District Court.—HON. J. H. PRESTON,
Judge.

MONDAY, MAY 24, 1897.

ACTION at law to recover of the late state inspector of oils, one of his deputies, and the sureties on their official bonds, for damages alleged to have been caused by the failure of the deputy to perform the duties of his office as required by law. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendants appeal.—*Reversed.*

Charles A. Clark and John M. Redmond for appellants.

Wheeler & Moffit, Smith & Son, and J. W. Jamison for appellee.

ROBINSON, J.—In the years 1891 and 1892 the defendant Dunn was state inspector of oils, and the defendant Martin P. Healy was his deputy at Cedar Rapids. Each had given an official bond as required by law. On the twenty-fourth day of December, 1891, Healy inspected a quantity of oil at Cedar Rapids, and marked the barrels which contained it:

"Approved; flash test, one hundred and six degrees.
Cedar Rapids, Iowa, December 24, 1891.

M. P. Healy, Deputy Oil Inspector."

Eight barrels of the oil so marked were sold to a merchant in Tipton, and he sold a small quantity of it to the plaintiff, a veterinary surgeon, who used it in his barn for illuminating purposes. In the evening of the last day of the month, a lamp in which the oil was being used exploded, and the results were that the plaintiff was seriously burned, and his barn, several horses and other property were destroyed. The plaintiff alleges that the sole cause of the explosion and fire and resulting damages was that the oil so inspected and sold was not equal to the standard required by law, and that the brand placed upon the barrels which contained it was false and fraudulent. On the former submission of this cause an opinion was filed, but a petition for a re-hearing was presented and sustained, and the cause is again submitted for our determination.

Chapter 185, Acts Twentieth General Assembly, as amended by chapter 149, Acts Twenty-first General Assembly, was in force at the time of the transaction in question. Under the provisions of those acts, it was made the duty of the state inspector and his deputies to provide themselves, at their own expense, with the necessary instruments and apparatus for testing the quality of illuminating oils manufactured from petroleum. If oil met the requirements of the law, the words, "Approved; flash test, — degrees" (inserting the number of degrees), with the date, over the official signature of the officer making the inspection, were to be branded upon the package, barrel, or cask which contained the oil. If the oil tested did not meet the legal requirements, it was to be branded in a similar manner, "Rejected for illuminating purposes; flash test, — degrees" (inserting the number of degrees); and it was made unlawful to sell rejected

oil for illuminating purposes. All oils which would emit a combustible vapor at a temperature of one hundred and five degrees, standard Fahrenheit thermometer, closed test, were to be rejected for illuminating purposes. The oil tester adopted and recommended by the state board of health was to be used, and it was made the duty of that board to provide the necessary rules and regulations for the inspection of illuminating oils, and for the government of the inspector and his deputies, which were to be approved by the governor, and be binding upon the inspector and his deputies. The inspector was required to give an official bond, conditioned for the faithful performance of the duties imposed upon him, which was to be for the use of all persons aggrieved by the acts of the inspector or his deputies; and each deputy was required to give a bond with like conditions, and for like purposes. Section 11 of chapter 185, specified, contains the following: "If any inspector or deputy shall falsely brand or mark any barrel, cask or package, or be guilty of any fraud, deceit, misconduct or culpable negligence in the discharge of his official duties, * * * he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding one hundred dollars, or imprisoned not exceeding thirty days, and be liable to the party injured for all damages resulting therefrom."

I. It is the theory of the appellants that the liability of the state inspector and his deputies is wholly statutory, and that there is no liability for erroneous branding unless it was known to the officer who made it to be incorrect, or unless he was
2 guilty of culpable negligence in making it. The appellee contends that there is both a common law and statutory liability, and that the defendants are liable for an erroneous branding whether the error

was known to the inspecting officer, or was the result of culpable negligence on his part, or not. The court refused to give instructions asked by the appellants in accordance with their theory, and charged the jury, in effect, that the defendants were liable for approving the oil in question, if, upon a closed test, it emitted a combustible vapor at a temperature of one hundred and five degrees or less, standard Fahrenheit thermometer, without regard to the knowledge or negligence of the officer who made the inspection. The liability of the defendants, if any, is statutory. The duties of the inspector and his deputies are prescribed by statute, and by rules and regulations adopted by virtue of the statute; and the obligation of their sureties is ascertained from the statute, the rules and regulations adopted pursuant thereto, and the conditions of the bonds they have signed. It is unnecessary, therefore, to discuss any question of common law liability. See *Scotten v. Fegan*, 62 Iowa, 236 (17 N. W. Rep. 491). It is important to determine the meaning which should be attached to the word "falsely," as used in the statute. Does it mean inaccurate, erroneous, or faulty, merely, or does it include the thought of intentional wrong? It is true that a false branding may be said to be inaccurate, erroneous, faulty; but the word "false" usually includes, not only the element of error, but also of intentional wrong. It is said in 7 Am. & Eng. Enc. Law, 661, that "this word means something more than untrue; it means something designedly untrue, deceitful, and implies an intention to perpetrate some treachery or fraud." See, also, *Putnam v. Osgood*, 51 N. H. 192, 206; *State v. Smith*, 63 Vt. 201 (22 Atl. Rep. 604); *Clapp v. Association*, 146 Mass. 519 (16 N. E. Rep. 436); *Mason v. Association*, 18 U. C. C. P. 19; *Insurance Co. v. Culver*, 6 Ind. 137; *Cohn v. Neeves*, 40 Wis. 393. See, also, *State v. Brady*, 100 Iowa, 191 (69 N. W. Rep. 293). The statute under consideration

makes the officer who violates its provisions liable both civilly and criminally upon precisely the same state of facts, and is therefore a penal statute, to be strictly construed. *Hanks v. Brown*, 79 Iowa, 563 (44 N. W. Rep. 811), and cases therein cited; Sutherland, St. Const., sections 208, 371. Statutes are sometimes enacted which prohibit acts, not because of any moral wrong involved in them, nor of any criminal intent with which they are committed, but from considerations of public policy; and persons are required to know the facts and obey the law, at the peril of punishment for disobedience, without regard to actual knowledge or wrongful intent. That is true of many fiscal, police, and other regulations. *Commonwealth v. Weiss*, 139 Pa. St. 247 (21 Atl. Rep. 10); *Commonwealth v. Raymond*, 97 Mass. 568; 3 Greenleaf, Ev., section 21; 1 Wharton, Cr. Law, section 88. But it is the general rule that a guilty intent is essential to the commission of a crime, and we are of the opinion that there is nothing in the language of the statute under consideration, even when construed with reference to the demands of public policy, which makes necessary the conclusion that an officer may, without intentional wrong or culpable negligence on his part, subject himself to penalties for which it provides. The injustice which might be done if this were not true is shown by the record in this case. The deputy who inspected the oil testified that the inspection was made according to the statute and the rules prescribed by the state board of health, with a thermometer which that board had furnished him, and that the oil flashed at a temperature of one hundred and six degrees. An experiment made after the fire, by an officer of the state board of health, with the instruments which were kept by that board, tended to show that the inspection was correct. Other experiments made in Tipton tended to show that the

oil flashed at a temperature of one hundred and four degrees. The evidence also shows that each thermometer differs in some respects from every other. Great care is taken by the state board of health to procure and furnish to the inspectors as reliable thermometers as can be obtained, but it seems to be true that absolute uniformity of results, from the best thermometers and apparatus to be had, cannot be

3 secured. If the inspecting officer uses instruments which have been approved and furnished by the state board of health, and which he has no sufficient reason to believe may not be in good order, and if they are used with due care, in the manner required by law and the rules of such board, and if he correctly brand the oil inspected, according to the results shown by the test, he is not liable for an error which may have occurred. And this is true upon the hypothesis that the state inspector and his deputies act in a ministerial, and not in a judicial capacity, in testing oils. Mechem, Pub. Off., sections 661, 677, 579; Throop, Pub. Off., sections 567, 726. The cases decided by this court upon which the plaintiff relies as sustaining a different conclusion are based upon different conditions, involving the application of different principles. The cases of *District Township v. Smith*, 39 Iowa, 10, and *District Township v. Morton*, 37 Iowa, 550, involved the obligation created by official bonds for the unconditional holding of and accounting for public money. The case of *Holmes v. Blyler*, 80 Iowa, 366 (45 N. W. Rep. 756), involved the liability of an officer for serving judicial process, and was governed by well-established rules of special application to such cases. In the case of *Bank v. Clements*, 87 Iowa, 542 (54 N. W. Rep. 197), we held that a county recorder who failed to index an instrument, which had been filed in his office for record, for several hours after he might have indexed it without

requiring assistance, and without working more than the usual number of hours, was guilty of negligence, not that he was absolutely liable for a failure to index the instrument when it was filed. The bonds upon which this action is founded required the state inspector and his deputy to faithfully perform their duties, and that, as we have seen, may have been done, even though, notwithstanding due care on their part, there was error in their work. Hence, the portion of the charge under consideration was erroneous.

II. The fourth paragraph of the charge to the jury was also erroneous, in that the defendants were made liable for the damages caused by the fire in question if the oil in controversy emitted a
5 combustible vapor at a temperature of one hundred and five degrees or less, standard Fahrenheit thermometer, closed test, even though the explosion of the lamp was not due to the inferior grade of the oil. It is not true that an explosion necessarily follows the use of oil for illuminating purposes which is below the grade required by the statute, and the defendants are not liable if the explosion in question was not in any respect due to the fact that the oil was below that grade. The plaintiff claims that other portions of the charge cured the error in the fourth paragraph, but we do not think that is true. The explicit statements of liability made in that paragraph were of a character to outweigh general statements made elsewhere in the charge.

III. The appellants complain of the admission in evidence of a certificate which purported to be signed by "Robert Brown, Secretary." The facts involved in its admission were substantially as follows:
6 The thermometers used by the state oil inspector and his deputies are furnished by the state board of health. They are made in Germany, of the

most perfect glass known to scientists for such use, and are sent to the observatory of Yale College to be scientifically calibrated. The errors in the marking of the scale are there ascertained by a comparison with the standard instruments of the observatory, and are recorded in a certificate which bears the number of the thermometer, and is designed to be kept and used with it. In using the thermometer, the variation indicated by the certificate is added to or deducted from the degree of temperature shown by the thermometer. The certificate is thus virtually a part of the instrument, and necessary to enable the person using it to obtain correct results. A thermometer used in making some of the tests upon which the plaintiff relied had been calibrated at the Yale observatory, and was introduced in evidence. The certificate in question was the one which belonged with that thermometer, and we do not understand that objection to the thermometer as evidence was made. The certificate was properly admitted with it.

The views we have expressed dispose of the material questions presented in argument. For the errors shown, the judgment of the district court is REVERSED.

EVA McDONALD, *et al.*, v. TAYLOR FREEMONT BASOM,
Appellant.

Evidence: ORAL AGREEMENT TO TRANSFER LAND: *Part performance.*

The burden is upon one asserting a parol agreement by his mother, in consideration that he would cultivate and improve her land and allow her to live with him whenever she chose, to give him the land at her death, to establish by clear and satisfactory evidence the existence of such agreement and his performance of the conditions.

RULE APPLIED. An oral agreement between a son and his father and mother who were about to separate, that the son was to have the use of certain land belonging to his mother, and the title in fee

on her death, in consideration of her having a home with him, is not established where it appears that the declarations of the father touching the agreement were not made in the presence of the mother; that the mother's statements, as shown by several witnesses, expressed no more than an intention to give the land to the son if he took care of her; and that, while one witness testified to a proposition made by the mother as claimed by the son, it did not appear that he assented to the proposition; and where it appears that the mother passed but a small portion of the remainder of her life with the son, and that part of the land was cultivated by a son-in-law.

Appeal from Carroll District Court.—HON. Z. A. CHURCH, Judge.

MONDAY, MAY 24, 1897.

AMOS W. BASOM, husband, and Eva McDonald, and Victoria J. Winnette, daughters, of Sarah L. Basom, deceased, filed their petition in equity against Taylor Freemont Basom, son and only other heir of said deceased, asking partition of a certain eighty-acre tract of land of which Sarah L. Basom died seized. Defendant answered, alleging, in substance, as follows: That about April, 1873, he entered into an oral agreement with his father and mother, that his mother should have a home with him whenever she chose to live with him; that he would improve and cultivate said land, and that in consideration thereof they agreed to give him the full use of said land, and, at the death of his mother, a clear fee-simple title thereto; that in pursuance of said agreement, and with the knowledge and consent of his father and mother, he took possession of said land, and has remained in possession thereof to the present time, and that he has at all times, and in all things, complied with his part of said agreement. He asks that said agreement be enforced as against the plaintiffs, that they be required to make conveyance to him, and that he be quieted in

the title to said land. Plaintiffs, in reply, deny that such an agreement was entered into, or that the defendant took possession of said land in pursuance of such an agreement. They allege that said land was the homestead of Sarah L. and Amos W. Basom, and occupied by them as such, "and that they never concurred in and signed the same joint instrument conveying or incumbering the same." The case was tried to the court, and the defendant, having the burden of proof, introduced his evidence, at the conclusion of which plaintiffs moved for a decree as prayed in the petition, which motion was sustained, and decree entered accordingly. Defendant appeals.—*Affirmed.*

C. C. Nourse for appellant.

W. R. Lee and *George W. Paine* for appellees.

GIVEN, J.—I. To defeat plaintiffs' right to partition, and to entitle himself to the relief demanded, the burden is upon the defendant to prove that a parol agreement was made as alleged; that he took possession of the land under it; that he gave his mother a home with him whenever she chose to live with him, and that he improved and cultivated the land. We first inquire as to the alleged agreement, to establish which the proofs must be clear, definite, and conclusive. *Moore v. Pierson*, 6 Iowa, 298. The circumstances surrounding the parties in April, 1873, were these: Appellant, then a young unmarried man, was living with his parents on the land, and devoting his time to the cultivation of it. Amos W. Basom, because of his ill temper and disagreeable manner, did not live pleasantly with his family, and for that reason decided to leave his wife and children, and return to Pennsylvania, from whence he came, which he did, remaining away about seven years. After he left.

appellant and his mother continued to live upon the land, he cultivating it, and she doing the housework, until appellant married, in 1874. In 1875, plaintiff Eva and her then husband, Mr. Heater, lived in the same house, each family having separate apartments and tables, Mrs. Basom taking her meals with appellant. During that year Mr. Heater worked part of the land in question, and paid the rent to Mrs. Basom. This is said to have been done because of the illness of appellant, rendering him unable to work all the land. So far as appears, appellant has, with this exception, had full use of the land to the present time, without any rent being demanded or paid therefor. Mrs. Basom, though spending a part of the time elsewhere, seems to have made her home with appellant on the farm up to 1880, after which she lived elsewhere to the time of her death in 1892. Part of this time she lived with her husband, Amos W. Basom. The evidence relied upon as establishing the alleged agreement is, in substance, as follows: Appellant testified: "Father said to me: 'I am going to leave. I am going away and if you will stay and take care of mother we will give you this eighty acres of land at her death.' And I told him I would. * * * Father done the principal part of the talking. * * * Mother says, 'You know father is going away, and you are to stay and take care of me, and after I am done,'—them was her words,—'after I am done,' she says, 'you can have this place.'" This evidence was objected to as incompetent under section 3639 of the Code, being in regard to personal transactions between the witness and the deceased. It is not questioned on this appeal but that the objection is well taken, and therefore this testimony must be excluded from consideration. The remaining testimony on this subject is that of several witnesses as to statements made separately by Amos W. Basom

and by his wife, Mrs. Basom. Mrs. Umbaugh says: "He said, in lieu of Freemont taking care of her, that he was to have this eighty acres of land." She said "that Freemont was to have this eighty acres of land for taking care of her, and in any way she spoke of it as Freemont's land. * * * He was to take care of her during her lifetime, and at her death it was his." Mr. Umbaugh, who was present at the same conversation, says: "He told me he was going away for to stay, and that he was going to leave all matters with Freemont,—that is his son,—for that he should take care of the old lady, Mrs. Basom, while she lived." Mr. Carnell testifies that Mr. Basom said "that Freemont would take care of her and the homestead. I calculated to let Freemont have it for taking care of his mother." Mr. McCurdy testifies that Mrs. Basom said: "She expected that when she was dead that Freemont would get the place." Martha Benedict testifies that Mrs. Basom said: "But she calculated that place for Freemont; that he was to have the land he lived on. She did not say what time he was to have it, but she calculated for him to have it." Mary Mogeney and Miss Basom, daughters of appellant, testify that their grandfather said that the land belonged to their father. M. A. Hoyt testifies that Mr. Basom said, when asked who was to take care of the farm: "I have arranged with Freemont to take care of my wife, and we give him the eighty acres the house stands on." W. R. Marshman testifies that he at different times heard Mr. and Mrs. Basom say, in the presence of appellant, that appellant "was to have a clear title to what was called the 'west eighty,' at the death of his mother, provided he would make a home for his mother and take care of her while she lived. He was also to improve and cultivate the land. This conversation I have heard, in substance, oft repeated by Amos W. Basom in the

presence of Taylor F. Basom and myself, and at other times have heard it repeated by Sarah L. Basom, in the presence of Taylor F. Basom and myself. Have heard it frequently talked of in the family to the effect that Freemont was to have the west eighty at the death of his mother, but cannot now recall such conversation when all three were present." It will be observed that, except in the testimony of appellant, none of the declarations of Mr. Basom appear to have been made in the presence and hearing of Mrs. Basom, the owner of the land; and that the statements made by Mrs. Basom, as testified to, were these: That Freemont was to have the property for taking care of her. She expected that when she was dead that Freemont would get the place. She calculated that place for Freemont. That he was to have a clear title at her death, provided he would make a home for her, and take care of her while she lived. There can be no doubt but that about the time her husband left Mrs. Basom did contemplate giving the land to appellant at the time of her death, if he took care of her during her life. There is nothing in any of the testimony, except that of Mr. Marshman, that tends to show more than such an anticipation. According to his testimony, she said, in the presence of appellant, that appellant was to have a clear title at her death, provided he would make a home for her, and take care of her while she lived, and improve and cultivate the land. But it does not appear that appellant assented to this proposition, and, in view of what subsequently occurred with respect to the use of the land, and the home and care of Mrs. Basom, we think the parties did not understand themselves to have made an agreement as alleged. We do not think that the appellant has established the alleged agreement by that clear and satisfactory evidence which the law requires in such cases. This conclusion renders it

unnecessary that we should consider other questions discussed, as, for this reason alone, the judgment of the district court must be **AFFIRMED**.

HENRY BENNETT V. THE CITY OF MARION, Appellant.

Municipal Corporations: EXEMPLARY DAMAGES. Exemplary damages cannot be awarded against a municipal corporation, except under express statutory authority.

102	426
119	478
119	479

Appeal from Cedar Rapids Superior Court.—HON. T. M. GIBERSON, Judge.

MONDAY, MAY 24, 1897.

ACTION for damages, on account of the discharge of sewerage from the defendant city into Indian creek, which creek crosses plaintiff's land, whereby the water of said creek is polluted and made unfit for use, to plaintiff's damage. There was a verdict and judgment for plaintiff, from which the defendant appealed.—*Reversed*.

Richard A. Stuart and Jamison & Smyth for appellant.

Rickel & Crocker for appellee.

GRANGER, J.—A suit between these parties for the same cause was determined in the superior court in September, 1894, in which the jury found for the plaintiff in the sum of three hundred dollars, and there was a special finding by the jury that the sewer as maintained was a nuisance. The plaintiff in this suit pleaded the judgment in that suit as a basis, as we understand, for exemplary damages in this suit, and the court instructed the jury that such damages might be awarded if the defendant, after such verdict,

and judgment, continued the flow from its sewer in wanton disregard of plaintiff's rights. The record presents the question if exemplary damages may be awarded against a municipal corporation. It may be conceded that the record in this case is such a one as would have fully warranted the instruction in a case where such damages are legally allowable. No case in this state is a direct authority on the subject. Such cases as *Ogg v. City of Lansing*, 35 Iowa, 495, and *Van-horn v. City of Des Moines*, 63 Iowa, 447 (19 N. W. Rep. 293), in so far as they announce a principle touching the question, are against the right of such a recovery. While the rule of compensatory damages has been sustained against municipal and *quasi* municipal corporations in this state, and, in some cases, under very aggravated conditions, the right to exemplary damages against such corporations has not been thought a right. Mr. Dillon, in his work on Municipal Corporations (section 1020), says: "*Actual damages only* can, in general, be recovered. The case would be exceptional, indeed, when the plaintiff could properly recover vindictive, or more than compensatory, damages." Mr. Sutherland, in his work on Damages (section 412), says, "Municipal corporations cannot be subjected to vindictive damages." This is a well established rule in Illinois. *City of Chicago v. Kelly*, 69 Ill. 475. The same rule is announced in West Virginia. *Wilson v. City of Wheeling*, 19 W. Va. 323. The principle also has support in *Hunt v. City of Boonville*, 65 Mo. 620. See, also, Thompson, Neg., section 1265. The cases on the subject do not appear to be numerous. The references by the text writers are, generally, to the same cases. California seems to be an exception to the rule denying such damages, but it is because of a statute giving such damages in express terms. See *Myers v. San Francisco*, 42 Cal. 215. We have seen no case sustaining the rule of the instruction,

independent of express statutory provisions, and we think on principle, as well as authority, such damages are not allowable. The judgment will stand REVERSED.

T. F. GREENLEE AND J. F. ATKINSON V. THE NORTH
BRITISH & MERCANTILE INSURANCE COMPANY,
Appellant.

102 427
126 250

102 427
135 302

Insurance: FORECLOSURE OF AND SALE UNDER MECHANIC'S LIEN:

- 1 *Change of interest.* When a policy was issued, mechanics' liens had
- 2 been filed. Before the loss, the liens were reduced to judgment, and an execution issued and the property was sold, and a certificate issued to the judgment creditor. The period of redemption had not expired at the time of the fire. *Held*, not to constitute a change of interest of the assured, within a condition of the policy providing for forfeiture in event that the title or possession of assured is changed by * * * legal process, or judgment. Citing *Wood v. Insurance Co.*, 149 N. Y. 862; *Insurance Co. v. Schmidt* (Pa. Sup.) 18 Atl. Rep. 817; *Hench v. Insurance Co.* (Pa. Sup.) 15 Atl. Rep. 671; *Shimer v. Hammond*, 51 Iowa, 401, criticized; *Hicks v. Insurance Co.*, 71 Iowa, 119, distinguished.

INCREASE OF HAZARD: Burden of proof. Where, at the time a policy

- 3 was issued, mechanics' liens had been filed against the building, judgment and execution sale under such liens, in the absence of evidence, do not show any increase of hazard, within the conditions of the policy. The burden of showing such increase is on the insurer, and mere change in the risk is not sufficient proof.

Appeal from Benton District Court.—HON. GEORGE W. BURNHAM, Judge.

TUESDAY, MAY 25, 1897.

ACTION at law upon a policy of fire insurance. Defense, breach of condition against incumbrances, and of a further condition against change of interest, title or possession by legal process, judgment or voluntary act of the insured, or otherwise. Plaintiff's reply is a denial, and also a claim of waiver. The case

was tried to a jury, resulting in a directed verdict for plaintiffs, and defendant appeals.—*Affirmed.*

McVey & McVey for appellant.

J. J. Mosnat for appellees.

DEEMER, J.—The property insured was a store and opera-house building and fixtures, situated in the city of Belle Plaine; and the policy contains these, among other, conditions: "This entire policy, unless
 1 otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means, within the control or knowledge of the insured, * * * or if the interest of the insured be other than unconditional and sole ownership, * * * or if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or if any change other than by the death of the insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise. * * *" At the time the policy was issued, mechanic's liens had been filed against the property, one by Robert Smith, who claimed six hundred and twenty-two dollars and sixty cents; and another by J. F. Atkinson, who claimed nine thousand four hundred and seventy-three dollars and sixty-eight cents. Thereafter, and before the loss, these mechanics' liens were reduced to judgments, and foreclosure decrees and an execution had issued upon the Atkinson judgment, and the property was advertised and sold, and a certificate had issued to Atkinson as purchaser. The period for redemption had not expired, however, at the time

of the fire. The defendant pleaded that these foreclosures and the sale of the property to Atkinson constituted a breach of the conditions of the policy above set out. By the terms of the policy, the loss, if any, was made "payable to J. F. Atkinson, as his interest may appear."

Appellant claims in argument that the judgments and decrees of the court foreclosing these mechanics' liens, and the sale of the property under the Atkinson decree, come within the express terms of the
2 policy, forbidding "a change in the interest, title, or possession of the subject of insurance, whether by legal process or judgment, or by voluntary act of the insured, or otherwise." Now, it is clear that the judgment and foreclosure proceedings did not change either the title or possession of the property. During the period for redemption, Greenlee, who was the owner of the property, held both the title and right of possession, and was entitled to the rents and profits thereof. Did these proceedings change the interest of the assured? The word "interest," as used in the policy, means the share, portion, or part that the assured had in the property; and, in order to determine whether or not there was a change by the proceedings complained of, we must see whether there was any change in his right. What share or portion had the assured in the property before the foreclosure proceedings and sale thereunder that he did not have afterwards? If the mechanics' liens were in fact liens upon the property at the time the policy was issued; the judgments and the sale under execution were no more. If they created no title, neither did the judgments, nor the sale on execution. In other words, neither the judgments nor the sale on execution created any new interest or estate. At most, a mere lien which was uncertain in amount, was made certain and conclusive, and an

indefinite period of redemption was made certain and definite. But neither of these things changed in any respect the share or part that the assured had in the property. In the case of *Curtis v. Millard*, 14 Iowa, 128, we said, in speaking of the estate created by a sale under execution: "Now, the courts have frequently declared that the purchaser of lands on execution acquires by his purchase no more than a lien upon the lands for the amount of his bid and interest. During the time allowed for redemption, he acquires no right or estate upon which he could maintain ejectment, or which could be levied upon and sold for his debts. It is simply an inchoate or conditional right to an estate, liable to be defeated any time within one year by the payment of the purchase money and interest." So, also, in the case of *Stanbrough v. Daniels*, 77 Iowa, 567, we said that one who held a certificate of purchase upon foreclosure proceedings is, during the year allowed by law for redemption, only a lienholder. Atkinson, then, was a mere lienholder at the time the fire occurred. He was also a lienholder for the same amount when the policy was issued, for the record shows that he bid no more than the amount of his judgment for the property. True, the amount was not ascertained and fixed until the judgment was rendered, but the lien existed for the true amount before as well as after judgment. The fixing of the period for redemption did not change the interest, portion or share that the assured had in the subject of the lien. In a certain sense, Greenlee had nothing but an equity of redemption in the property, uncertain as to time within which it should be exercised before judgment, certain and fixed afterwards. It appears to us that there was no substantial violation of the conditions of the policy above referred to. In the case of *Wood v. Insurance Co.*, 149 N. Y. 382 (44 N. E. Rep. 80), the court, in construing a like

condition in a policy, said, in speaking of the effect of a sale upon execution: "At the time, therefore, that the property in question was destroyed by fire, the interest, title, or possession of the insured had not been changed. The statute (which is much like ours) had operated to postpone the effect of the sale upon the interest, title, or possession of owners until the expiration of the period for redemption." We have held that an interest in real estate is something more than a right to a remedy against it, and a lien therefore, whether special or general, is not an interest in lands. *Andrews v. Burdick*, 62 Iowa, 714. As the sale upon execution gave to Atkinson nothing more than a lien, or at most an inchoate or conditional right to an estate, he acquired no interest in the property; and, if he acquired no interest Greenlee lost none. We do not overlook a statement made in the case of *Shimer v. Hammond*, 51 Iowa, 401, to the effect that a purchaser at execution sale holds the equitable title to the property. But it is manifest that such statement was not essential to the determination of the controversy, and should therefore be regarded as *dictum*. It will be noticed that the conditions of the policy sued upon in this case do not avoid the policy in the event that the property should be incumbered by judgment, as did the provisions in the policies involved in the cases of *Insurance Co. v. Schmidt* (Pa. Sup.) 13 Atl. Rep. 317, and *Hench v. Insurance Co.* (Pa. Sup.) 15 Atl. Rep. 671, relied upon by appellant. Hence these cases are not in point. Neither is the case of *Hicks v. Insurance Co.*, 71 Iowa, 119, for the reason above stated, and for the further reason that it is expressly held in *Lodge v. Insurance Co.*, 91 Iowa, 103, that a judgment is not an incumbrance, within the meaning of that term as used in insurance

policies, explaining and distinguishing the *Hicks Case*. To avoid the policy in this case, the judgments or other proceedings must change either the interest, title, or possession of the subject of insurance. As we have seen, they did neither.

Appellant further contends that the judgments and execution sale violated the condition of the policy as to increase of hazard. We do not think this is so.

The amount of the liens was in no manner
3 increased, except, it may be, to the extent of the costs taxed in the case; and there was no evidence offered or introduced which tended to show that any increase of hazard resulted from the proceedings to enforce the mechanics' liens. We cannot presume that there was any such increase. *Russell v. Insurance Co.*, 71 Iowa, 69; *Russell v. Insurance Co.*, 78 Iowa, 216; *Martin v. Insurance Co.*, 85 Iowa, 643; *Runkle v. Insurance Co.*, 99 Iowa, 414; Wood, Ins., section 243. Moreover, the condition last referred to does not apply to immaterial changes, which do not increase or enhance the risk. Changes in the form of an existing lien will not, as a matter of law, amount to an increase of hazard. Wood, Ins., section 245. And the insurer has the burden of proving an increase of risk. Proof of a change in the risk, without more, does not make out the defense. It must also appear that the change increased the hazard. Wood, Insurance, section 260. It is clear that the condition with reference to foreclosure sale of the property under mortgage or deed of trust was not violated. As none of the conditions of the policy were broken, the district court was right in directing a verdict for the plaintiff, and the judgment is **AFFIRMED**.

J. W. BROWN AND P. W. BROWN, Administrators of the Estate of D. T. BROWN, Deceased, D. T. BLODGETT AND ALVILDA R. BROWN, Substituted Plaintiffs, Appellants, v. R. B. AND L. E. ZACHARY, Appellees, JULIA A. BROWN, Intervener.

Indorsement Without Recourse: MISREPRESENTATIONS: *Rescission.*

2 Where representations of the assignor of notes secured by mort-
4 gage on land in another state, with reference to the land and
5 notes, were expressions of opinion, and based on information only,
and the assignee investigated the value of the land and the notes,
without hindrance by the assignee, and lived three years after
without making complaint, and it was not shown that he did not
know that the notes were worthless when he purchased them, his
representatives were not entitled to rescind on the ground of
fraudulent representations as to the value of the notes. Such
case is not within the rule that one who endorses worthless paper
without recourse is liable for the consideration received, when the
indorser does, and the indorsee does not, know the paper to be
worthless.

Admissions. A letter, written by the assignor to the assignee shortly

1 before the transaction, in which he said, "I took this paper myself
and know it to be good, and a good man behind it," would not be
presumed to refer to the notes in suit, in the absence of evidence.

Depositions: *Privies.* Depositions taken before one of the defend-

3 ants was made a party to the suit, are not admissible against him,
although his interest in the subject litigated was older than the
litigation. Citing *Jenkins v. Bisbee*, 1 Edw. Ch. 377; *Hutchinson*
v. Reed Hoof, Ch. 816; *Pratt v. Barker*, 1 Sim. 1; *Wood v. Swift*, 81
N. Y. 31.

Appeal from Jasper District Court.—HON. D. RYAN,
Judge.

TUESDAY, MAY 25, 1897.

It is charged in the petition that in April, 1890, D. T. Brown, since deceased, entered into a verbal contract with the defendant, R. B. Zachary, by the terms of which said Brown was to transfer a certain

three hundred and thirty-nine acres of land in Jasper county, Iowa, and a certain one hundred and sixty acres of land in Cedar county, Neb., to said Zachary, for an agreed consideration of fifteen thousand dollars, to be paid as follows: Zachary was to assume and pay a certain six thousand five hundred dollar mortgage then on the Jasper county land, to place to the credit of said Brown three thousand five hundred dollars in the bank of L. E. Zachary & Son at Prairie City, Iowa, and to transfer to Brown, without recourse, four notes, signed by one E. B. Fullington, aggregating five thousand three hundred dollars. These notes, together with one for one thousand dollars, were to be secured by a second mortgage on six hundred and forty acres of land in Woodson county, Kan., the first mortgage thereon being for six thousand five hundred dollars. These notes to be turned over to Brown were to be further secured by a mortgage on certain personal property. In an amendment to the petition it is alleged that this agreement was in writing. It is charged that, for the purpose of inducing Brown to enter into the contract, said Zachary reported to Brown that the maker of the notes was solvent and able to pay the same, having property consisting of six hundred and forty acres of land in Woodson county, Kan., which was mortgaged for an ample security for the notes after paying prior liens; that said lands so mortgaged were worth twenty dollars per acre; that said representations were, in fact, false, and known to be so by said Zachary; that they were relied upon by Brown, who on the faith thereof, entered into the contract. Zachary filed an answer in denial of the affirmative allegations of the petition. He also averred that a trade was made with Brown for the land described in the petition, which contract was in writing. He attaches a copy of said contract to his answer, and avers full compliance with its terms

on his part. Thereafter Julia A. Brown, the widow of D. T. Brown, filed her petition of intervention, repeating the allegations of the petition, and averring that she is the sole devisee and legatee under the will of her late husband, that there is more than enough personal property to pay the debts of said estate, and prays for a rescission of the contract and an accounting for the rents of the land. The plaintiffs, in their petition, ask a judgment for the amount of the Fullington notes, and the establishment of a vendor's lien upon the lands traded to Zachary. November 16, 1894, more than eight months after the original petition was filed, and after a large number of depositions had been taken in the case, the plaintiff and intervener amended their petitions, making L. E. Zachary a party defendant, and alleging that the two Zacharys colluded and conspired together, for the purpose of effecting a transfer of the notes to Brown and of obtaining from him the title to the real estate conveyed by Brown under the contract; that L. E. Zachary was in fact the owner of the Fullington notes, and of the real estate conveyed to Brown under the contract, or at least of an interest therein, and was a party to all of the alleged representations. Thereafter the defendants answered the petition as amended by adopting the answer of R. B. Zachary, and further pleaded that, prior to the commencement of this suit, the cause of action had been purchased by D. T. Blodgett. Afterwards said Blodgett and the defendant Alvilda R. Brown filed an amendment to the petition, asking to be substituted as defendants, and in a further amendment averred that Julia A. Brown had, after this suit was commenced, transferred to said parties all her rights in the cause of action, and they tender and offer to surrender the notes and ask a rescission of the contract of sale between D. T. Brown and R. B. Zachary. They also reaffirm all allegations made in

the petition and in the petition of intervention. To this answer and amendment defendants filed a general denial. The cause was tried to the court, and a decree entered, on December 3, 1895, dismissing plaintiff's petition and substituted petition and the petition of intervention upon their merits, and for costs against the said substituted plaintiffs and intervener. The substituted plaintiffs and the intervener appeal.—*Affirmed.*

Howard J. Clark for appellants.

H. S. Winslow and *W. G. Clements* for appellees.

KINNE, C. J.—I. November 16, 1894, L. E. Zachary was made a party defendant. Plaintiffs charged that he was a party to the fraudulent transactions stated in the petition and to the representations made, and that the trade was the result of a conspiracy by the Zacharys to defraud Brown. It appears from the evidence that the land purchased by Fullington, and by him mortgaged to secure the five thousand three

hundred dollars in notes, was owned by L. E. Zachary, and by him conveyed to Fullington.

Prior to the time L. E. Zachary was made a party defendant, the plaintiff had taken the depositions of thirty-nine witnesses. This evidence was duly objected to by L. E. Zachary, when it was offered, on the ground that, as against him, it was incompetent and immaterial. We think all of this evidence was improperly admitted as against L. E. Zachary. Not having acquired any interest in the matter in controversy after the suit was instituted, he did not stand in privity to the defendant, R. B. Zachary, and if not made a party defendant, would not be bound by any decree entered in the case. *Brady v. Burke*, 90 Cal. 6 (27 Pac. Rep. 52); *Campbell v. Hall*, 16 N. Y. 575; *Lange*

v. Braynard, 104 Cal. 156 (37 Pac. Rep. 868). It is said that, "to make one a party privy to an action, he must be one who had acquired an interest in the subject-matter of the action, either by inheritance, succession, or purchase, from a party to the action, subsequent to its institution. A privity antedating the action does not work an estoppel." *Bryan v. Malloy*, 90 N. C. 508. What is said in the cited cases is applicable to the case at bar, as L. E. Zachary did not acquire any interest *pendente lite* but prior to the commencement of this action. As to him, therefore, when he became a party, it was a new action, and he could not, against his objection, be bound or in any way affected by depositions taken by the plaintiffs before he was made a party to the action. *Jenkins v. Bisbee*, 1 Edw. Ch. 377; *Hutchinson v. Reed*, Hoff. Ch. 316; *Pratt v. Barker*, 1 Sim. 1; *Wood v. Swift*, 81 N. Y. 31. The depositions taken after L. E. Zachary was made a party utterly fail to establish a case against him. It follows that in any event the decree below was correct, so far as L. E. Zachary was concerned. Appellee claims that L. E. Zachary was a necessary party to the suit, and therefore, as no decree could, under the circumstances, be entered against him, it follows that none could properly be entered against R. B. Zachary. As, in any event, the case as to R. B. Zachary must be affirmed, we need not determine whether the failure to make a case against L. E. Zachary would preclude plaintiffs from recovering against R. B. Zachary upon proper evidence as against him.

II. Before discussing the case as made by the evidence against R. B. Zachary, we may properly say that this record is incumbered by a large amount of evidence which we cannot consider. We cannot undertake, within the limits of an ordinary opinion, to point out the incompetent, immaterial, and hearsay evidence, but shall treat the case as if all such evidence

had been eliminated from the record. It is incumbent on plaintiffs to establish the alleged fraud and fraudulent representations. This they undertake to do by showing statements claimed to have been made by R. B. Zachary, and declarations said to
2 have been made by D. T. Brown, deceased.

While there is some evidence tending to show that Zachary admitted making certain statements to Brown regarding the trade, the land, and the Fullington notes, yet, considering all of the evidence touching this matter, we think the weight of it is to the effect that whatever statements were made by Zachary to Brown were nothing more than mere opinions as to the value of the Kansas land and the notes, based upon information or belief. The evidence of plaintiffs' witnesses regarding this matter is over-
3 come by that of the defendants' witnesses.

Stress is laid by plaintiffs upon a certain letter, said to have been written by Zachary to Brown, in which the former speaks of certain mortgage paper which he would trade to Brown, and in which letter it is said: "I took this paper myself, and know it to be good, and a good man behind it." This letter does not in any way show what notes or mortgage paper is referred to, and it is only by assuming something not in the letter that we can say that it had reference to the Fullington notes. We cannot enter into an elaborate discussion of the evidence. We, after a full examination of it, conclude that the claim that Zachary made the representations alleged as to the notes and land, and the value of each, is not
supported by the evidence, nor does it appear

4 that Zachary practiced a fraud upon D. T. Brown by withholding from him facts relating to these matters. Again, there is evidence, much of it showing that Brown did investigate the land and its value, the notes and their value, and satisfied himself

regarding the matter. True, he did not go to Kansas, but he did by letter conduct such investigation. It is said he wrote only to two parties,—one the agent of Zachary, and the other a friend of said agent,—and that arrangements had been made by Zachary in advance as to how the letters should be answered. The evidence does not show that Zachary had asked these parties to make any representations other than the truth as to the matters inquired about. Nor does it appear that Brown did not make inquiry from other persons. Again, it appears that Brown had ample time and opportunity to investigate regarding the land and its value, and the notes,—in fact, as to all matters embraced in the deal between him and Zachary. There is no evidence tending to show that Zachary said or did anything to prevent Brown from making such investigation. He had it in his power to have ascertained the real facts touching the matters now complained of, and, as he was in no manner prevented from making such an investigation as he saw fit, if he failed so to do, neither he nor those now representing him should be heard to complain. There is another fact worthy of notice. Brown lived for about three years after this trade was consummated, and there is no competent evidence which tends to show that he made any complaint. His own wife did not know anything regarding the conditions of the trade. It may be that the Kansas land was not worth more than eight or ten dollars an acre, and it is likely that the Fullington notes were of much less value than their face; but the evidence fails to show the false representations or fraud alleged, and it appears that Brown had ample opportunity to investigate the character and value of the land and notes, and, under all the circumstances disclosed by this record, we think it is clear that plaintiffs have failed to make a case.

III. Appellants say that it is conclusively established that the five thousand three hundred dollars of notes were worthless, and that Zachary knew that fact when he transferred them to Brown, and that the maker of them was insolvent, and that Brown paid full value for them, not knowing that the maker was insolvent and the notes worthless. Counsel rely upon

Watson v. Cheshire, 18 Iowa, 202, and *Dayton v. Tillotson*, 39 Iowa, 404. The doctrine of these cases is, that if one, by indorsement without recourse of negotiable paper, transfers the paper to another, knowing the paper to be worthless, and the assignee receives it in good faith, in ignorance of such fact, paying a valuable consideration therefor, he may recover from the assignor the consideration paid. We do not think that the facts disclosed by the evidence bring this case within the rule of the cited cases. We doubt if it can be said, under the evidence, that these Fullington notes were worthless. True, there is much evidence to that effect, but the maker of the notes himself testifies that he owns one hundred and sixty acres of land in Kansas, in addition to the land upon which the mortgage rested, which secured the notes. What its value was is not made to appear. We cannot presume that this one hundred and sixty acres of land was of no value. It may be admitted that Brown paid a valuable consideration for the notes. Even if the evidence did show that the notes were worthless, and that such fact was known to Zachary, still it fails to show that Brown was ignorant of the character of the paper which he agreed to take. It does not show that he did not know it was worthless, if such was the fact. On the contrary, as we have said, it is shown that he made investigation touching all the facts, and did know of the real character of the paper which he afterwards took. Under the circumstances disclosed,

the rule of law laid down in the cases relied upon cannot avail plaintiffs.

Inasmuch as the case must be affirmed upon the merits, we shall not pass upon appellee's motions. The decree of the district court is correct.—**AFFIRMED.**

JANE E. BLANDEN V. THE CITY OF FORT DODGE,
Appellant.

Highways: MUNICIPAL CORPORATIONS. A city must exercise its
8 power to lower the grade of a street in the manner prescribed by the statutes conferring such power and, when the street is cut down without conforming to such statutes, it is liable for any resulting injury to the abutting property owners.

SAME. A city cannot avoid liability to an abutting property owner
4 for the removal of shade trees in the street in front of his property, on the ground that they were a nuisance and obstructed travel, where it assumed to act under invalid proceedings to establish a grade.

SAME. A municipal corporation can exercise its power to establish a
2 street grade only by an ordinance or other legislative action.

SAME. A resolution of a city council "that a permanent grade be,
1 and the same is, hereby established," on a certain street, "except where already established, and the committee on streets and alleys is hereby authorized to employ a competent engineer at once to establish said permanent grade as above described," is not an establishment of the grade, but is merely a provision for establishing it in the future.

ESTOPPEL OF OWNER. An abutting property owner is not estopped
5 to complain of the lowering of a grade of the street and the removal and injury of shade trees in front of his premises, under invalid proceedings of the city council, because, with a view of saving the trees, he urged those in charge of the work to make as little cut in the street as possible, and to allow him to lower the trees.

Appeal from Webster District Court.—**HON. B. P. BIRD-SALL, Judge.**

TUESDAY, MAY 25, 1897.

102	441
106	58
106	677
102	441
111	429
102	441
4112	370
102	441
116	324
117	630
102	441
118	637
4118	640
102	441
120	439
1120	557
122	181
102	441
1125	332

THE plaintiff is owner of lots 4 and 5, in block 11, of Ft. Dodge, Iowa, fronting to the north, on Central avenue, one hundred and twenty feet, and to the west, on Tenth street, one hundred and forty feet, on which has been erected a large dwelling house. No grade was established on either of these streets before October, 1892. Prior to October fourth of that year, the defendant excavated and removed the earth and trees from Central avenue in front of these lots, and about two-thirds across the lots on Tenth street, leaving the trees and sidewalk somewhat elevated above the level of Central avenue; and in the spring of 1893, Tenth street was dropped to the level of Central avenue. Plaintiff asks for damages on the ground that all this was done without the adoption of any resolution or ordinance as required by law. The defendant interposes four defenses: (1) A general denial; (2) that everything done was in pursuance of authority vested in the city, and was ordered by a unanimous vote of its council; (3) that all work complained of was done after July 5, 1892, by the street and alley committee, as directed by a unanimous vote of the city council, and whose report of its doings was approved by the council October 4, 1892, and an ordinance passed establishing a grade on such streets in conformity with the changes made; (4) that plaintiff is estopped from claiming damages, because all changes were made by reason of the request and consent of plaintiff, through her agent. Thereupon, plaintiff demurred to the second and third counts of the answer; the demurrer to the second count being overruled, and that to the third count being sustained; and only the latter ruling is complained of. The demurrer to the third count was, in substance, that the resolutions of July 5, 1892, and the ordinance of October 4, did not authorize or

approve the acts of defendant in removing the earth and trees. There was trial to jury, verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Blake & Mitchell and Botsford, Healy & Healy for appellant.

R. M. Wright, Frank Farrell, and P. F. Nugent for appellee.

LADD, J.—I. Three resolutions were adopted July 5, 1892, by the unanimous vote of the city council. The first resolution orders a grade to be established on Central avenue, and the committee on streets and alleys is authorized to employ a competent engineer to establish such grade. The second and third resolutions provide that Central avenue shall be guttered and curbed on both sides, and a sidewalk laid, at the expense of the abutting property owners. The first resolution is relied on, but can only be construed as directing a survey and measurements preparatory to the establishment of the grade. The part of the resolution involved is: "That a permanent grade be, and the same is hereby, established on Market street in said city, except where already established; and the committee on streets and alleys is hereby authorized to employ a competent engineer at once to establish said permanent grade as above described." Market street is now Central
1 avenue. Under the ruling in *Kepple v. City of Keokuk*, 61 Iowa, 653 (17 N. W. Rep. 140), such
2 a grade can only be established by an ordinance or other legislative action. It is there said: "Establishing a grade does not mean the actual lowering or raising of the surface of the street. It means the fixing of a base line, or plane of reference, and certain measurements from that plane. * * * We think

the establishment of a grade means the passing of an ordinance, or other legislative action of the council of the city, prescribing and fixing grade lines to which the surface shall be brought when the street shall be improved." The resolution simply provides that such grade shall be established in the future, and the only authority given the street and alley committee is the employment of a competent engineer to make the survey and measurements, necessary for the accomplishment of such purpose. The ordinance of October 4 establishes the grade provided for in this resolution. No order was made by ordinance or otherwise requiring the raising or lowering of the streets, or the removal of the earth or trees. This could only be done when directed by an affirmative vote of
3 two-thirds of the city council. Code, section 465. The city must exercise its power in the manner prescribed by the statutes, and when a street is cut down without so doing, it is liable for the injury, if any, resulting to the abutting property owners. *Trustees of Diocese of Iowa v. City of Anamosa*, 76 Iowa, 538; *Meinzer v. City of Racine*, 74 Wis. 166. The demurrer to the third count was properly sustained.

II. Ordinances passed by the city in 1869 and 1873 prohibited the planting of trees where those of plaintiff were growing. The court directed the jury to take into consideration the removal of the trees if planted before that time, but not to do so if planted thereafter. Appellant says that there is no testimony upon which to submit whether the trees were planted before the ordinance of 1873. Berry, the son of plaintiff, says they were planted in 1875. Kirchner testified
4 he had passed the premises every day since 1866, and thought the trees were planted in 1868. The question, then, was properly submitted. It is also insisted that the city had the right to remove

the trees because they were a nuisance, and obstructing travel; but they were not removed for this reason, and there is no evidence tending to show that they in any way obstructed travel, or interfered with the proper use of the streets.

III. The defendant pleaded an estoppel based upon conversations between the members of the city council and Colonel Blanden, husband and agent of plaintiff, on the ground that the improvements were made by reason of his request and consent.

5 The record fails to show any request for the making of the improvements, or consent that they should be made. It does show, however, that Colonel Blanden was very anxious to avoid the destruction of the shade trees growing on the west and north of the lots. He consulted with the members of the city council with this end in view, and urged them to make as little cut in the street as possible, and allow him to lower the trees. When given to understand that he must either lower those on the north, or they would be taken out after examining them he said, "Take them out." He indicated that he could stand a cut of two or two and one-half feet, but that made was much more. He asked that Tenth street be not cut down till spring, so that he might lower the trees there after the ground had frozen, and that, to enable him to do this, the work, when done, be completed at one time. At another time, when the work was being done, he said, being spoken to about an injunction: "Go on, and do the best you can; that's all. When I get ready to serve an injunction, you will know it." The connection in which this language was used is not shown, but, when considered with the other evidence, it can only be understood as meaning that he desired them to do the best for him they could, for this was what he was striving for at all times. The evidence conclusively shows that he did

no more at any time than to express a choice or election as to methods in doing the work. It utterly fails to show that the excavations were made on the strength of any request or consent of Colonel Blanden. The court rightly withdrew this evidence from the consideration of the jury, and refused to submit the issue of estoppel.

IV. Ordinance No. 165, adopted in June, 1892, did not repeal ordinance No. 20, prohibiting trees outside the curb line, or more than one foot from the curb line in the inside. The space between the outside of the sidewalk and the curb line might be graded and parked as provided in the former ordinance, but in doing so trees can only be planted within one foot from the curb line.—**AFFIRMED.**

ANDERSON & ELLIS, Appellants, v. WILLIAM WEDEKING.

Brokers: COMMISSIONS. A real estate broker is not deprived of his
 2 right to commissions for procuring a purchaser, by the fact that the latter procured the deed to be executed to a third person.

Jury Question. Plaintiffs brought suit to recover their commission
 1 for furnishing a purchaser for real estate, alleging, but not proving,
 2 fraudulent conduct on the part of the defendant. Defendant did not deny the agreement, nor that plaintiffs furnished the purchaser. There was a conflict as to what was to be paid for commission. *Held*, that the plaintiffs' cause of action should have been submitted to the jury.

SAME: Damages. When there is a contention between the plaintiff
 8 and defendant with respect to the amount of damages recoverable on an attachment bond, the question should be submitted to the jury.

Appeal from Sac District Court.—HON. Z. A. CHURCH,
 Judge.

TUESDAY, MAY 25, 1897.

PLAINTIFFS state as their cause of action, in substance, as follows: That on or about January 17, 1896, the defendant orally appointed them agents to negotiate and to furnish a purchaser to whom defendant might sell his certain one hundred and twenty-acre farm in Sac county; that it was agreed that plaintiffs should have a compensation of one dollar per acre; that they procured one Berner to enter into negotiation with defendant for said land; that "defendant entered into negotiations directly with said Berner, through one Potzke, to whom he pretended he had sold said land, for the purpose only of cheating and defrauding plaintiffs out of their commission." In an amendment they alleged "that defendant, for the purpose of defrauding plaintiffs out of their commission, pretended to have transferred said land to one Potzke after plaintiffs had procured said purchaser, Berner, but plaintiffs aver that said pretended transfer was made by defendant to Potzke with intent by both defendant and Potzke to deceive, defraud, and defeat plaintiffs out of their commission, and was in fact no transfer whatever." Plaintiffs caused attachment to issue in the action. Defendant answered, denying each and every allegation in the petition contained, and by way of counter-claim alleged that the attachment was wrongfully sued out, and asked to recover damages on the bond. Plaintiffs, in reply, admitted the suing out of the attachment and the execution of the bond, and denied every other allegation in the counter-claim. Verdict and judgment were rendered in favor of the defendant. Plaintiffs appeal.—*Reversed.*

I. W. Bane for appellants.

Chas. D. Goldsmith for appellee.

GIVEN, J.—I. The court instructed the jury that the plaintiffs had failed to sustain their cause of action, and that, therefore, they could not find in plaintiffs' favor on their cause of action, and of this plaintiffs' 1 tiffs complain. Plaintiffs' cause of action is the alleged agreement to furnish a purchaser, and that they performed the same by furnishing one Berner, who purchased the land from the defendant. The plaintiffs each testify to the agreement as alleged, that they brought Mr. Berner and the defendant together, and that Berner purchased the land. Berner testifies: "That it was only through the plaintiffs that I became aware that said land was for sale, and through no one else, and that I finally did purchase said land from Wedeking, and that it was transferred to my father, through me, by warranty deed; that I have paid for the same as per the agreement between me and Wedeking; that all of the talking that I did in negotiating for the sale of this land was with the defendant." Defendant does not, in his testimony, deny that there was an agreement, nor that plaintiffs furnished Berner as a purchaser, and that he sold the land to him. He testifies that he was to pay plaintiff all over twenty-seven dollars per acre that they could sell the land for. Under the evidence, the only disputed fact was whether plaintiffs were to receive one dollar per acre, or all over twenty-seven dollars per acre, as their compensation. It is true, there was no evidence to sustain the alleged fraud, nor was 2 it required to sustain plaintiffs' cause of action. It appears that Mr. Berner, the purchaser, caused the land to be conveyed to his father, but this in no wise defeats plaintiffs' right to recover. We think the court erred in not submitting plaintiffs' cause of action to the jury.

II. In instructing with respect to the counter-claim, the court told the jury that the attachment was wrongfully sued out; that the defendant was entitled to recover actual damages, and that
3 the evidence showed that he had sustained such damages, in the sum of nineteen dollars; and that their verdict should be in his favor for that amount. The issues joined on the counter-claim should have been submitted to the jury. The evidence of the defendant shows that he had been deprived of the use of his money held by garnishment under the attachment, but there was some contention as to the length of time during which it had been so withheld. He also testified that he had incurred expenses in defending against the attachment, in the way of attorney's fees and traveling expenses. These items are legitimate elements of damages, but, there being a contention with respect thereto, the same should have been submitted to the jury. For the reasons stated we conclude that the judgment of the district court must be REVERSED.

102	449
1135	600

F. S. STARRY, Guardian, Appellant, v. GARRY
TREAT, *et al.*

Highway Establishment: NOTICE. Under Code, section 936, requiring notice of hearing on a petition to establish a highway to be given to all owners of land in the proposed highway and abutting thereon, "as shown by the *transfer books*," where the *transfer books* show title in a decedent, notice need not be given to his heirs, though his death and the names of the heirs are shown by the county records.

Appeal from Linn District Court.—HON. GEORGE W.
BURNHAM, Judge.

TUESDAY, MAY 25, 1897.

ALBERT STARRY died seized of certain real estate, leaving a widow, Emma J., and a daughter, Ethel A. Starry, a minor, to whom belonged the real estate,—one-third to the widow and two-thirds to the daughter. The estate was settled and the administrator discharged prior to January, 1892. January 29, 1892, a petition for the establishment of a public highway across the land referred to was filed with the auditor of Linn county. Regular proceedings were had, so that a commissioner reported in favor of the location of the highway; and the same was thereafter, by order of the board of supervisors, established. During the pendency of these proceedings no guardian had been appointed for the minor daughter, for whose benefit this suit is now brought by the plaintiff guardian, since appointed. After the death of Albert Starry the widow took charge of all the real estate, and leased the same, and had general supervision of it, but without any appointment or express authority from the court. Notice of the time when the petition for the location of the highway would be acted upon was published as required by law, and served on the widow, who filed a claim for damages as owner of all the land left by her husband. No notice was served on the minor, nor on any one as representing her. The transfer books in the auditor's office showed Albert Starry as the owner of the lands in question, who, as we have said, was deceased. This action is to set aside the order of the board of supervisors establishing the highway, and the members of said board and the road supervisor of the road district are made parties defendant. The district court, upon the final submission of the cause, dismissed plaintiff's petition, and the plaintiff appealed.—*Affirmed.*

Giffen & Voris for appellant.

Rothrock & Grimm for appellees.

GRANGER, J.—The claim of appellant is that without a service of the notice on Ethel A. Starry, the minor, the board of supervisors was without jurisdiction to establish the highway. The following is section 936 of the Code: "Within twenty days after the day is fixed by the auditor as above provided, a notice shall be served on each owner or occupier of land lying in the proposed highway, or abutting thereon, as shown by the transfer books in the auditor's office, who resides in the county, in the manner provided for the service of original notice in actions at law; and such notice shall be published for four weeks in some newspaper printed in the county, if any such there be, which notice may be in the following form." The form of notice is in conformity to the requirements of the section, providing, among other things, that the names of the owners of land through which the proposed road is to pass shall be stated therein as they appear upon the transfer books of the auditor's office; and it will be noticed that the section, as quoted, requires the notice to be served on each owner of abutting property "as shown by the transfer books in the auditor's office." Such transfer books did not show Ethel A. Starry such an owner, but it is said they showed Albert Starry as the owner, and that the records in the clerk's office would show him deceased, and that a list of all his heirs and representatives are there recorded in the probate proceedings; and the argument is that because of this the owner should have been known and served. To us, the difficulty with the position is that it requires a service to be

made on one not contemplated by the statute. The service is to be made in all cases by publication, and a personal service is to be under certain conditions; that is, on an owner, who appears to be such by the transfer books, who resides in the county. If we can, by construction, make the law apply to one who by the records of the county can be known as an owner, why may we not so extend the operations of the statute as to require service on an owner who resides outside the county, if the records should disclose such a fact, and the place of residence? The statute, as it reads, is plain and unmistakable, and, if left undistorted by construction, may be intelligently followed, while, if we attempt to extend it to meet exceptional cases because it may easily be done, we may render such cases a good service at the expense of uncertainty and confusion in the general administration of the law. Prior to the present Code (1873), the only service in such cases was a substituted one, by posting notices, and under the law the roads, generally, in much of the state, were established. The Code continues a substituted service in all cases, by publication instead of posting, and adds a personal service under certain conditions. The right of condemnation could be justified alone on a service by publication, and hence the provision for personal service is founded in legislative discretion, and is a matter of right no further than it is granted. The question before us was considered, and, we think, determined, in *Wilson v. Hathaway*, 42 Iowa, 173. We reach this conclusion entirely independent of the facts as to the natural guardianship of the mother, or the tenancy in common of the mother and daughter. If the result is a hardship, it is the result of the law, which we are powerless to remedy. There is a claim that the proceeding is void for a neglect to personally serve the tenant who was occupying the land at the

time. That question does not arise on the record. It seems to be presented in this court in argument, for the first time.—**AFFIRMED.**

MARBY J. DARR v. H. L. DARR, Appellant.

Partition: AMENDED PETITION. An action was brought to procure an adjudication of rights of the parties in certain lands. The original petition was not framed for the purposes of a partition suit and did not have an abstract of title attached, as Code, sections 8278 and 8279, require. After all the evidence was in, plaintiff amended, asking partition. The amendment to petition had no abstract attached. *Held*, said statutes are mandatory and it was error to grant partition.

Appeal from Linn District Court.—HON. W. P. WOLF, Judge.

WEDNESDAY, MAY 26, 1897.

ACTION to set aside a contract and deed of conveyance and quiet title to real estate. Decree for plaintiff, from which defendant appealed.—*Modified and Affirmed.*

M. P. Smith and *W. O. Clemans* for appellant.

Thompson & Stuart and *Jamison & Smyth* for appellee.

GRANGER, J.—I. The action involves the title to lot 28, block 28, in Green's addition to Cedar Rapids, Iowa. The parties are mother and son, the mother being plaintiff. The defendant purchased the lot in question of George Green, in August, 1877, for seven hundred and fifty dollars; three hundred and fifty dollars being paid in hand, and a mortgage given on the lot to secure the payment of the balance of the purchase price. Since the purchase, a house and barn

have been built, and other improvements made on the lot, so that the cost has been in all respects one thousand three hundred dollars. Because of a rise in values in real estate, the premises are now worth considerably more. There is no dispute but that all the business of the purchase, payments, and improvements of the lot has been done by the defendant. There is a decided conflict as to the facts of who furnished the money for such purposes; it being plaintiff's claim that she has furnished all except four hundred and fifty dollars of such amounts, and defendant's claim is that he has furnished the entire amounts. The parties are also in contention as to the understanding in pursuance of which the lot was purchased and improved; the plaintiff's being that, because of defendant's agreements to improve the lot and make a home for her there, and that the two should live there together as long as she lived, and he should support her, she consented that he should take the title in his name, and that she sold her property on Ninth avenue, in Cedar Rapids, and the money was put into the lot and improvements; that she and defendant moved onto the lot in 1881 or 1882, and resided there till 1892, when the defendant left, and she still resides there; that defendant has neglected and refused to care and provide for her as he agreed, because of which she asks relief. On the other hand, the defendant claims that the purchase of the lot, and the improvements thereon, were on his own account, and that the plaintiff has no interest therein; that, while it is true that plaintiff has resided with him on the lot, she did so merely as his mother for whom he cared as long as she would permit him to do so; that he left the home because of her treatment of him and his wife. The testimony deals with a multitude of facts that cannot be made to appear. At the close of the testimony the plaintiff so amended

her petition as to show herself the owner of three-fourths of the premises, and the defendant one-fourth. She also amended the prayer thereof so as to ask partition of the lot on the basis of such shares. The defendant moved to strike the amendment to the petition so made, because the petition as amended did not conform to the law as to petitions for partition of real estate. The court overruled the motion, and, upon issues presented, the court found, upon the evidence before taken, that the plaintiff and defendant purchased the lot together, each furnishing one-half the purchase money; that the title was in the defendant because of an agreement to support plaintiff, which he failed to do; that the title to plaintiff's interest was held in trust; and the court adjudged the shares equal, and ordered partition on that basis.

II. It will be well for us to first settle the status of the case as to the partition. It will be remembered that the amendment of the petition, so as to ask for partition, was made after all the evidence was in on which the cause was finally submitted, so that no evidence was taken under such an issue. It is provided that actions for partition shall be by equitable proceedings, and no joinder or counter-claims of any other kind shall be allowed therein, except as is provided by Code, section 3277. The following are sections 3278 and 3279 of the Code:

"The petition must describe the property and respective interests of the several owners thereof, if known. If any interests or the owners of any interests are unknown, contingent, or doubtful, these facts must be set forth in the petition with reasonable certainty."

"The plaintiff shall attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through

whom such title was obtained, together with a statement showing the page on which the same appears of record. If such title, or any portion thereof, is not in writing, or does not appear of record, such fact shall be stated in the abstract, and either party shall furnish the adverse party with a copy of any unrecorded conveyance or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. No written evidence of the title shall be introduced on the trial, unless it has been sufficiently referred to in such abstract, which, on motion, may be made more specific, and may be amended as other pleadings."

A very pertinent query, as to this question, is, could partition have been had on the petition as amended, and prayer therefor made, had such a petition been presented at the commencement of the proceeding? All would say, "No." Why? Because it was not a petition for partition that was in substantial compliance with the requirements of the law. It is to be said that none of the requirements of section 3279 were complied with at any time. The court would have no right to set aside those requirements of the statute. It is not important to inquire as to their purpose. They are mandatory, and their non-observance is fatal, upon proper objections. If this is true, upon what theory may the court, when a cause has been tried upon other issues and upon evidence introduced that is clearly incompetent under issues for partition, permit partition upon an insufficient petition for such a purpose? Appellees say nothing that we can regard as a sufficient answer to this query, and we can conceive of no sufficient answer. Such a proceeding is simply evasive of positive statutory requirements. It is not enough to know that, in this case, there is no prejudice, because of no dispute about the particular matters to be effected by a

compliance with the statute. The law was made for all cases of that class, and the courts must not disregard it for any reason, against proper objections.

III. Upon the merits of the case, as to the rights of the parties to the lot in question, we think the decree of the district court is right. There are facts not easily reconciled with that view, and the same difficulty arises with any conclusion sought in the case. It is a case of loose dealings between mother and son, and naturally so, because of their mutual confidence in each other, at a time when it did not appear but that such relations and confidence would always continue. Defendant has made too many admissions to the effect that his mother had an interest in the lot of considerable value, to easily convince one that he has paid for all the lot and the improvements, and that plaintiff never had any legal rights in it. There are none of us who do not think that at least one-half should go to the plaintiff. If there are doubts, they are in the direction of greater rights to her. In fact, she asks in this court that all the lot be given her; but we do not consider that branch of the case, for the reason that she has not appealed, and in such a case we do not render a more favorable decree for appellee than that entered below. In so far as the judgment provides for a partition of the property it will be reversed. In other respects it will stand affirmed. One-fourth of the costs of the appeal will be paid by appellee.—**MODIFIED AND AFFIRMED.**

JOHN WILTS v. MULHALL BROTHERS, Appellants.

Interpretation of Ambiguous Contract: EVIDENCE. Mulhall Bros. recovered judgments against claimant. They arranged to have him deed some land on which their judgments were liens to a stranger who assumed all liens. Another judgment, also a lien on the land, was obtained against plaintiff by one Wilts. Mulhall Bros. agreed by a writing to "release all personal judgments and liens of record against the land, only, as more fully shown" by an exhibit which merely set out certain mortgages and judgments held by Mulhall Bros. against plaintiff. It also provided that all liens and judgments were to remain a lien. Plaintiff paid off the Wilts judgment and sought to recover therefor, on said contract, at law. *Held,*

- a. The contract did not cover the Wilts judgment.
- b. The clause *releasing* plaintiff from all personal judgments and liens is, apparently, a limitation upon the clause that all judgments should remain liens.
- c. The contract was so ambiguous as that Mulhall Bros. should have been allowed to show that the grantee had received a release of the Wilts judgment before they signed said contract, and that they knew this before signing.

LADD, J., took no part.

Appeal from Sioux District Court.—HON. SCOTT M. LADD, Judge.

WEDNESDAY, MAY 26, 1897.

ACTION at law to recover an amount claimed to be due by reason of an alleged breach of contract. There was a trial by the court without a jury, and a judgment for the plaintiff. The defendants appeal.—*Reversed.*

Argo, McDuffie & Reichman for appellants.

No appearance for appellee.

ROBINSON, J.—On the eleventh day of August, 1890, the plaintiff and one Huseman, then owners of the southwest one-fourth of section 2 in township 96 north, of range 47 west, entered into an agreement with the defendants, which was reduced to writing, by which, in consideration of a special warranty deed for the land, which the plaintiff and Huseman executed to James P. Mulhall, the defendants relinquished all claims and demands against said grantors, “as shown by an exhibit, marked ‘A’,” attached to the agreement. The agreement also contained the following: “It is, however, understood that all liens and judgments that may appear against the premises are to remain a lien thereon, but that said parties of the second part [the plaintiff and Huseman] are to be released of all personal judgments and liens only as the same now appear of record against said land.” The claims shown by Exhibit A were two mortgages and “also any and all judgments that may have been obtained by Mulhall Bros. against said Wilts and Huseman at the last April term of court held in Orange City, Iowa.” On the seventeenth day of April, 1890, one Herman Wilts obtained judgment against the plaintiff, which was of record in Sioux county when the agreement was made, and a part of which was then unpaid. In the latter part of the year, a general execution issued on the judgment, and on the last day of the year the plaintiff paid, in satisfaction thereof, the sum of one hundred and fifty-four dollars and sixty cents. The petition alleges that it was especially agreed between the plaintiff and the defendants, on or about the eleventh day of August, 1890, that the defendants were to pay the balance due on the judgment as part of the consideration of the conveyance to John P. Mulhall; that the agreement so made was a part of the consideration for the conveyance of the land, and that the clause in the written agreement, “to be

released" from all personal judgments, etc., was understood and agreed by the parties to the contract as referring to the judgment specified; that, in consequence of the fact that the contract was prepared at some distance from the county records, the judgment was by mistake not properly described in the writing,—and it is asked that the writing be reformed. The defendants admit the making of the contract upon which the action is founded, and that they have not paid the judgment, and deny all averments of the petition not admitted. The judgment of the district court was for the amount claimed by the plaintiff.

I. The deed executed to James P. Mulhall by the plaintiff and Huseman contained the following: "And we do hereby covenant to warrant and defend the said premises only against the claims of all persons claiming by, through, or under them, except all liens, judgments, and mechanics' liens, as the same now appear of record in Sioux county, Iowa, against said land, which the said James P. Mulhall hereby assumes to pay." No attempt was made to have the cause tried as in equity, no attempt was made to have the agreement corrected, and no evidence was introduced to show any mistake in it, nor to show any agreement excepting what is contained in portions of different instruments which we have set out, nor was there any other evidence which tended to show that the defendants agreed to pay the balance due on the judgment in question; therefore it is necessary for us to inquire whether the written agreement made it the duty of the defendants to pay it. By that agreement the defendants in terms relinquished "all claims and demands against" the plaintiff and Huseman, "as shown more fully by Exhibit A." That described two mortgages, and, in addition, included all judgments which may have been obtained by the defendants against the

other parties to the agreement at a term of court specified. The provision, "It is, however, understood that all liens and judgments that may appear against the premises are to remain a lien thereon," was, it is probable, for the protection of the defendants, and indicated plainly that the judgments and other claims referred to were not to be regarded as satisfied. The provision which followed, "But that said parties of the second part are to be released of all personal judgments and liens only as the same now appear of record against said land," was not necessarily an undertaking to discharge the parties referred to from liability on account of the judgment and other liens on the land. "To release" is not the same as "to assume," and the defendants had no right to release the plaintiff and Huseman from their liability to third persons. The provision does not purport to be an independent undertaking, but may have been, and we think, from the record submitted to us, was designed to be explanatory of and a limitation upon the relinquishment of "all claims and demands," for which a preceding clause of the agreement has provided. This view is strengthened by the fact that the deed to James P. Mulhall required him to assume the payment of "all liens, judgments, and mechanics' liens" which then appeared of record in Sioux county against the land.

II. The contract in suit is not entirely free from ambiguity, and we are of the opinion that verbal testimony was receivable to explain some of its provisions. Three days before it was made James P. Mulhall, who was not of Mulhall Bros., received from Herman Wilts, who recovered the judgment in question, an instrument in the form of a quitclaim deed of the land described, which recited that it was for the purpose of releasing all the interest of Herman Wilts in the land acquired by virtue of his judgment. One of Mulhall Bros. was asked

to state whether he knew, at the time he signed the contract in suit, that the deed or release of Herman Wilts had been made, but was not permitted to answer the question. We think his answer should have been received. It would have tended to explain the knowledge which the defendants had when they signed the contract, and to have explained the ambiguity in it and the purpose it was designed to accomplish.

III. The district court must have tried the case upon the theory that the contract required the defendants to hold the plaintiff harmless from the judgment in question, and that verbal evidence was not admissible to explain it. In this, as we have seen, there was error, and the judgment of the district court is in consequence REVERSED.

LADD, J., took no part.

GEORGE S. SNEER AND MINNIE E. HOLLAND v. CATHERINE STUTZ, *et al.*, Appellants.

108 462
122 579

WILLS: TRUSTS. An executor held the property in trust under the will
 1 for certain persons, and was given the custody and full control
 and management thereof, and ample authority, without order of
 2 court, to lease and sell and convey or otherwise control the same
 in his own name as executor, having as full right and authority to
 3 manage it and its proceeds as though he were unmarried, and had
 acquired absolute title by purchase. *Held*, that no property rights
 were thereby conferred on the executor, and that he could sell
 only, in good faith, in the execution of the trust.

SAME. Testamentary trustees who are expressly authorized to sell
 real property in their discretion without authority from or
 4 approval of the court, may exercise such power for the purpose of
 raising money to pay taxes and expenses in the care and manage-
 ment of the trust property.

EXEMPTIONS FROM GIVING BOND. Where a will provided that the
 executor who was also trustee under the will, could act without
 giving bond, and was silent as to whether grand children of tes-
 5 tatrix should give bond on assuming the trust on the executor's

death, a bond would be required of them, under McClain's Code, section 3550, providing that trustees appointed by will or by court must give bond the same as executors.

Appeal from Polk District Court.—HON. T. F. STEVENSON, Judge.

WEDNESDAY, MAY 26, 1897.

SUIT in equity for the construction of the will of Mariah Grimmel, deceased, and to establish and quiet plaintiffs' title to certain real estate of which she died seized. Issue was taken on certain averments of the petition, and the court rendered a decree upon the statements contained in the pleadings, from which the defendants appeal.—*Affirmed*

Berryhill & Henry for appellants.

Dudley & Coffin and *Granger & Bennett* for appellees.

DEEMER, J.—The will which we are asked to construe was before us, and a decision as to its effect was filed, on December 18, 1894. The opinion will be found in 93 Iowa, 62. In that case we found that plaintiffs herein are entitled to the accumulations of the estate of Mariah Grimmel, deceased, in consequence of the management and use thereof by George Sneer; that the estate other than such accumulations is in the hands of plaintiffs as trustees for their children, and that the interest of defendants is contingent upon plaintiff's dying without leaving issue surviving them. After the procedendo was returned from this court, plaintiffs filed amendments to their petition, in which they alleged, among other things, the following matters, which are admitted by the defendants: (1) That since the commencement of the original suit there has been born unto George S. Sneer a child, which is now living, and that plaintiffs both have living issue.

(2) The premises of which Mariah Grimmel died seized are described, and it is said that upon one lot is a house, which needs repairs from time to time, and which plaintiffs are required to keep insured, and that the property yields no income. The other facts which are deemed material are contained in the original petition and the amendment to the prayer thereof, and are as follows: George Sneer, deceased, was appointed executor of the last will and testament of Mariah Grimmel, deceased, and entered upon the discharge of his duties as such, and at the time of his death, which occurred on August 25, 1891, had fully performed his duties as such, and closed and settled the estate, except in so far as he was made a trustee under this will. Sneer left a will, in which he appointed the appellees executors of his estate, and they qualified and entered upon the discharge of their duties as such. As we have said, this suit is brought to secure an interpretation of the will of Mariah Grimmel, and to secure a decree directing the trustees as to how to proceed in the discharge of their trust with reference to the care, custody, control, and management of the property devised by her; to determine upon what conditions and for what purposes they may sell and convey the property; and to fix and determine the purposes for which they may use the proceeds arising either from a sale or from the rental of the property. The lower court found that the plaintiffs' interest is in the accumulations arising in consequence of the use and management thereof by George Sneer, deceased; that the estate other than this accumulation is in the hands of plaintiffs in trust for their children; and that they have full care, custody, control, and management of such property, with authority to rent, lease, contract, bargain, sell, and convey the same as such trustees, without joining in their individual capacities as grantees; that they have as full power to manage the estate as trustees as if they were sole and unmarried,

and had acquired the absolute title to such property by purchase. They were further decreed to have authority to sell, convey, and mortgage the property without the authority or approval of the court, and were exempted from giving bonds as such trustees. It was also declared by the decree that purchasers from the trustees should take the title in fee free from any right or claim of the residuary legatees, or of any of the defendants herein. It is from this decree that the appeal is taken.

The former opinion conclusively settles the question as to the title and estate that the plaintiffs acquired under the will, and further holds that plaintiffs were trustees holding the property in trust for their children. To determine their powers, we must look to the instrument creating this trust, and find out, if we can, from that, what they were authorized to do. If there is no direction in the will as to how the trust shall be executed, we must then look to the law for their powers. We said in the former opinion that: "George Sneer had no greater authority in exhausting the property than to make advances to George S. and Minnie E. Sneer during his life, but his right to do so from other than the increase from use and management is at least

1 doubtful. * * * The same conditions are applicable to Geo. S. and Minnie after the trust devolved upon them. The language, both as to George and his children, giving them power and authority to dispose of the property without any interference, is limited by the trust imposed, and is to be taken as fixing the manner of its discharge, and not as conferring property rights." As the powers of George S. and Minnie E. Sneer are the same as those conferred upon George Sneer we look to his powers. The will bequeaths the property in trust to George Sneer, to be held, used, and managed during his lifetime for the use and benefit of his two children, George S. Sneer and Minnie E.

Sneer, should they survive him; and further provides that George Sneer shall, during his lifetime, have the full care, custody, control, and management of all the property, with full and ample right and authority to rent, lease, contract, bargain, sell, and convey, or otherwise control the same, * * * in his own name as executor, and without joining with him as grantor either his wife or the residuary legatees mentioned in the will, having and exercising in this respect as full right and authority to so manage the same, and the proceeds thereof, as though the said George Sneer was sole and unmarried, and had acquired the absolute title to all of said property by purchase. He was also exempted from the necessity of obtaining the authority or consent of the court to the making of sales, and the approval thereof after they were made. The will says: "All such questions are hereby left to his individual judgment and discretion, with full power to act as in his judgment may seem best for the interests of the residuary legatees."

The fourth clause of the will is as follows: "*Fourth.* I hereby appoint my said son George Sneer sole executor of this will and testament, and having full faith in his integrity and ability to manage said property during his lifetime for the best interests of all concerned. I hereby exempt him from giving bonds, and also from filing any inventory list or appraisement list of the property coming into his hands hereunder in any probate or other court, and none of the residuary legatees hereunder or mentioned herein shall be entitled to have or receive from my said executor during his lifetime any of the property or proceeds or rents or profits thereof which may come into his hands under this will unless the said George Sneer shall, in his judgment, deem it best and advisable to make advances to his said children George S. Sneer and Minnie E. Sneer, or either of them." The

manner of the execution of the trust is thus clearly provided for, and we think the decree of the lower court was correct in this respect, except that it should

2 have more plainly directed that the appellees should make such disposition, and such only, of the property, as to them, in the exercise of the utmost good faith, might seem best for the proper administration of their trust. Having no interest in the property other than the accumulations—except as trustees for their children—they can only sell in execution of their trust, and not on their own account. Whether they were to receive any part of the estate was left to the judgment of George Sneer, and, as he is dead, they are entitled to nothing in their own right save the accumulations of the property while in the management of said Sneer. The court below declared that they had as full power to manage the estate as trustees as though they were sole and unmarried, and had acquired absolute

3 title to all of said property by purchase. But, as said in the former opinion, this language of the will and of the decree as well is limited by the trust imposed, and is to be taken as fixing the manner of its discharge, and not as conferring property rights. As thus limited and construed, the decree of the district court is correct; for the effect of it is simply to allow the trustees to sell the property if, in the exercise of their just discretion, they thought it ought to be sold; not for their individual benefit, but in their capacity as trustees for the benefit of their children if they survived, or for the defendants in the event the trustees died without

4 leaving issue surviving them. Without specific authority from the will, the trustees have the power to use the income, or, if need be, to sell the property, to pay taxes and expenses in the care and management of the property. Perry, Trusts, section 554. And as the will expressly says that they may sell

without authority from or approval of the court, there is no doubt of the correctness of the court's ruling in so far as sales may be made for these purposes. But we think, as before indicated, that they may make any sales which, in their judgment, in the exercise of an honest purpose, they believe to be for the best interest

5 of the *cestui que* trust. In the fourth clause of the will we find that George Sneer, on account of the special confidence and trust reposed in him by the testator, was exempted from giving bond. Appellees contend that they are entitled to the same immunity. The statute (McClain's Code, section 3550) says: "Trustees appointed by will, or by the court, must qualify and give bond the same as executors, and shall be subject to control or removal by the court in the same manner." Unless there be something in the will relieving appellees from this responsibility, the court should require the giving of bond. The clause of the will referred to, might well be construed to mean, that Sneer as executor was not required to give bond. But, however, this may be, we think that this immunity was personal to George Sneer, and was not intended by the testator to be extended to these appellees. During their lifetime they have, it is true, the same management of the property as was given to George Sneer; but there is not a word said about their not giving bond. The statutory requirement as to bond does not relate to the management of the property; and to require these trustees to give bond, the same as executors, interferes in no manner with their management of the estate. It seems to us that, as the exemption was clearly personal to George Sneer, it should not be so extended as to apply to the appellees. They should, under the provisions of the statute before quoted, be required to give bond. The decree of the court below will be so modified as to require the appellees to give the bonds required by the

statute, and with this exception, construed in the light of the interpretation placed upon it in the first paragraph of this opinion, is approved.—MODIFIED AND AFFIRMED.

A. W. WICKHAM, Receiver of THE FIRST NATIONAL BANK OF ELLSWORTH, KANSAS, v. NELSON HULL AND JOHN T. LIDDLE, Executors of the Estate of O. N. HULL, Deceased, Appellants.

LACHES. The delay of a receiver of a national bank for over eighteen months after an assessment of the capital stock of the bank, under U. S. Rev. Statutes, sections 5151, 5152, to enforce the same against the estate of a stockholder who died before the bank had been closed, does not bar a claim against the estate, founded upon a judgment recovered therein, although no reason is given for the delay, where the estate is solvent, and no prejudice has resulted from the delay.

Estates: FILING CLAIMS: Limitations. A claim against the executors arising under U. S. Rev. Statutes, sections 5151, 5152, by reason of the testator's ownership of stock in a national bank which was closed after his death is not within Code, section 2421, providing that all claims of the fourth class against decedent's estate shall be barred unless filed and approved within twelve months of the giving of notice of the appointment and qualification of the executors, as that section is limited to claims existing at the time of decedent's death.

Appeal from Linn District Court.—HON. W. P. WOLF, Judge.

WEDNESDAY, MAY 26, 1897.

ON May 21, 1894, the plaintiff filed a claim for approval against the estate of O. N. Hull, deceased. The claim, not being expressly admitted in writing, is to be considered as denied, without any pleading on behalf of the estate. Code, section 2410. The application was heard by the court, and an order made that the claim be allowed in favor of the plaintiff in the sum of

102	469
104	268
102	469
111	171

three thousand, seven hundred and thirty dollars and seventeen cents. The defendants appeal.—*Affirmed.*

C. J. Deacon for appellants.

Rothrock & Grimm for appellee.

GIVEN, J.—I. The facts necessary to be noticed are these: O. N. Hull died, testate, December 6, 1889. His will was probated January 4, 1890. The defendants were appointed and qualified as executors January 16, 1890, and notice thereof was duly published for three consecutive weeks, commencing January 19, 1890. The estate is solvent and still in process of settlement. On the twenty-sixth of January, 1891, the First National Bank, of Ellsworth, Kan., suspended business; and on the eleventh day of February, 1891, Mr. Wickham was appointed receiver of said bank by the comptroller of the currency. On the eleventh day of December, 1891, said comptroller made an assessment of seventy-six per cent. upon the capital stock of said bank, and authorized the receiver to enforce the payment of such assessment against the stockholders of the bank. On June 12, 1893, the plaintiff brought an action against these defendants, as executors in the circuit court of the United States northern district of Iowa, Cedar Rapids division, to charge said estate, under the statutes of the United States, with said assessment upon shares of the capital stock of said bank owned and held by said deceased at his death, and then owned by said executors as such. These defendants appeared, and defended against said action; and on the tenth day of May, 1894, upon a final hearing, judgment was rendered in said action in favor of the plaintiff for three thousand, four hundred and sixty-five dollars and sixty cents, and for fifty-five dollars and twenty-one cents, costs. See *Wickham v. Hull*,

60 Fed. Rep. 326. On May 12, 1894, the plaintiff filed his claim in the district court of Linn county for the allowance of said judgment, with interest, as a claim against said estate, and the single contention involved in this appeal is whether, under these facts, this claim is barred because not filed within twelve months after publication of notice of the appointment of the executors, or, in other words, whether the facts showed such peculiar circumstances as entitled the plaintiff to equitable relief. By the judgment of the federal court, the existence of the indebtedness was judicially determined, but the question as to whether it is barred by section 2421 of the Code was expressly reserved for the decision of the state court, the learned judge saying: "I hold it the better course to remit the decision of the matter to the state court."

II. Section 2420 of the Code divides claims against estates into five classes, as follows: (1) Debts entitled to preference under the laws of the United States; (2) public rates and taxes; (3) claims filed within six months after the first publication of the notice given by the executors of their appointment; (4) all other debts; (5) legacies. Section 2421 is as follows: "All claims of the fourth of the above classes not filed and proved within twelve months of the giving of the notice aforesaid are forever barred, unless the claim is pending in the district or supreme court, unless peculiar circumstances entitle the claimant to equitable relief." In *Savery v. Sypher*, 39 Iowa, 675, this court held that the limitation applies only to claims existing at the time of the decedent's death, and not to debts subsequently incurred by the estate. In *Sankey v. Cook*, 82 Iowa, 126 (47 N. W. Rep. 1077), we held, in effect, that a claim which is contingent upon the result of litigation will not be barred because of a failure to file and approve the same within the twelve months, especially where the estate remained unsettled and was solvent. The liability

for which the judgment under consideration was rendered arose under sections 5151 and 5152 of the Revised Statutes of the United States. Section 5151 enacts that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Section 5152 enacts that "persons holding stock as executors, administrators, guardians, or trustees, shall not be personally liable as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testate, intestate, ward or person interested in such trust funds would be if living and competent to act and hold stock in his own name." This statutory liability is not in favor of the bank, but of its creditors, and did not arise until, by reason of the insolvency of the bank, it did not have sufficient assets out of which payment of its liabilities could be enforced. Under the law, this liability may be enforced through the receiver for the benefit of the creditors, and the liability now sought to be enforced is against the estate under the provisions of said section 5152. The twelve months allowed for filing claims expired January 19, 1891. At that date the bank was open and transacting business in the usual way, and it was not until January 26, 1891, that it suspended, and not until February 11, 1891, that the receiver was appointed. In view of these conditions, it is clear that up to January 19, 1891, the liability was contingent and undetermined, and that there was no claim that could have been filed and proven prior to that date. This claim did not exist at the time of Mr. Hull's death, but has arisen since, as a liability against his estate, and is therefore within the rule announced in *Savery v. Sypher*, *supra*. It was a contingent and undetermined claim on and before January

19, 1891, and is therefore within the rule of *Sankey v. Cook, supra*, and not subject to the limitation provided in section 2421.

III. Appellant's counsel cite many cases to show that no claim has been allowed by this court where, through negligence, the claimant has failed to file and prove his claim within the time prescribed in section 2421, but, that limitation not applying to this claim, the cases are not in point. The receiver came into possession of the assets on February 23, 1891; the assessment was made by the comptroller December 11, 1891; and on June 12, 1893, the receiver commenced his action to enforce the same. While, for anything that appears, that action might have been commenced sooner, yet the delay was without prejudice to the estate. By that action the defendants were notified of the claim, and, as was their right, appeared and defended against it. The judgment was rendered on the tenth day of May, 1894, filed in the district court for allowance on the twelfth day of May, 1894, and, by the evidence before us, is fully proven to be a legal and valid claim against the estate. We do not think it should be said in the face of this record that the plaintiff has been so negligent in the presentation and prosecution of this claim as that the same should be held to be barred.—AFFIRMED.

M. A. PARSONS, Appellant, v. C. G. WRIGHT.

Construction of Pleadings: LANDLORD AND TENANT. A complaint by a lessor set out a provision of the lease, that if the lessee held over after a forfeiture, he should pay a certain sum per day as liquidated damages, and alleged damages by failure to pay rent, and that lessee held over, and that such sum per day was justly due. It did not allege an election to declare a forfeiture, nor, in terms, that the sum claimed was for liquidated damages. *Held*, that an answer denying that any sum was due to plaintiff under the lease, was sufficient to put in issue the question whether plaintiff's claim was for liquidated damages, or a penalty.

Forfeiture of Lease. An indebtedness from a landlord to his tenant, on account of the former's occupancy of a part of the premises, in an amount in excess of an installment of rent, prevents the non-payment of such installment from working a forfeiture, under a provision of the lease giving the landlord the option to declare a forfeiture for failure to pay the monthly installments of rent when due.

Appeal from Cedar District Court.—HON. WILLIAM P. WOLF, Judge.

WEDNESDAY, MAY 26, 1897.

ON August 22, 1895, the plaintiff filed his petition, alleging, in substance, as follows: That on October 1, 1894, he leased, by written contract, set out, to the plaintiff, a certain building, for the period of one year from that date, at the rental of six dollars per month, to be paid at the end of each month. That the defendant failed to pay the rent for the months of July and August, 1895. That said lease provides as follows: "And the said second party further covenants that, in case immediate possession be not given on forfeiture of this lease, or at the expiration of the full term thereof, to pay to the said party the sum of one dollar for each and every day the said premises shall be thus withheld; second party agreeing hereby that the same be the liquidated damages for withholding such possession; time being of the essence of this contract." He alleges that the defendant refused to vacate and deliver possession of said premises to plaintiff; that by the non-payment of said rent said lease was forfeited, and the rent of one dollar per day is now justly due and unpaid; that defendant has been in possession of said premises for the period of sixty days since the non-payment of said rent and forfeiture. In an amendment filed December 5, 1895, plaintiff claims for an additional fifty days' possession, making one hundred and ten days in all, for which he asks to recover one hundred and ten dollars.

He also asks for special execution against the property kept in the building, under provisions of the lease referred to. The defendant answered the original petition September 3, 1895, admitting the execution of the lease and possession of the premises, but denying "that there is any sum whatever due the plaintiff under said lease, and that he is in any way indebted to the plaintiff under said lease." The defendant sets up a counter-claim for certain uses made of said premises by the plaintiff during the year, and for damages caused by plaintiff's refusing to allow him to set up a certain laundry machine in said building. Plaintiff replied, denying the counter-claim, and alleging that under a certain provision of the lease he had a right to refuse to allow said machinery to be set up in said building. The case was tried to a jury, and a verdict returned, "We, the jury, find for the defendant," upon which verdict judgment was rendered. Plaintiff appeals.—*Affirmed.*

Isaac Landt for appellant.

Wright & Wright for appellee.

GIVEN, J.—I. It will be observed that this action is not to recover for the monthly rent of six dollars alleged to be due and unpaid, nor to recover for possession of the premises after the expiration of the year for which the lease ran. It is to recover one dollar per day under the provisions of the lease quoted above, upon the theory that the lease had been forfeited. The court instructed as follows: "You are instructed that under the terms of the written lease and under the undisputed evidence, plaintiff, as a matter of law, would not be entitled to recover for forfeiture claimed, but only for the unpaid rent during the time the premises were occupied by defendant, at the rate of six dollars per month, with

interest at six per cent. on each month's rent from the time it became due." Plaintiff complains of this instruction upon the ground that his claim that the one dollar per day is stipulated and liquidated damages is not denied in the answer. The pleadings, though voluminous, are not as definite as they should be. For instance, plaintiff sued to recover for possession held during the term of the lease, relying upon a forfeiture thereof by a failure to pay rent. The lease gives the plaintiff the option to declare a forfeiture for such a failure, but he does not aver that he ever exercised that option, or declared the lease forfeited. Neither does he allege, in terms, that the amount claimed is due as liquidated damages, but simply alleges that the sum "is justly due from defendant." We think defendant's denial that there is any sum whatever due to the plaintiff under the lease was sufficient to put in issue the nature of plaintiff's claim, and to call for an instruction on that subject.

II. Plaintiff contends that the clause in the lease quoted above fixes the one dollar per day as liquidated damages, and not as penalty, and therefore the court erred in giving said instruction. If it be conceded that the provision as to one dollar per day is liquidated damages and not penalty,—a matter we do not determine,—yet, under the uncontradicted evidence, the instruction was not prejudicial to the plaintiff. Under the lease the rent was not payable until the end of each calendar month. Plaintiff says in his petition, filed August 22, 1895, that defendant has neglected and refused to pay the rent for July and August, 1895. The rent for August was not due at the commencement of this action, and the right to then forfeit the lease rested solely upon the failure to pay the six dollars for July. Plaintiff admits in his evidence that he was occupying part of the leased premises with wood, clover seed, and other articles, as charged in the counter-claim; that the

room occupied by the wood would be worth one dollar and fifty cents, the clover seed fifty cents, and the rubbish upstairs fifty cents a month. It is very clear, under the evidence, that the jury was warranted in finding in favor of the defendant on his counter-claim in an amount equal to that due to the plaintiff for rent. This indebtedness of the plaintiff to the defendant existed at the time that the plaintiff claims the lease became forfeited for non-payment of rent, while the fact is that there was no rent due to the plaintiff, and therefore he had no right to forfeit the lease. It seems to us that under the pleadings it was error for the court to allow the plaintiff to recover for the unpaid rent, but of this neither party is complaining. Our conclusion is that the court was fully warranted in instructing the jury that under the terms of the lease and the undisputed evidence the plaintiff was not entitled to recover for the forfeiture claimed. The judgment of the district court is **AFFIRMED.**

**F. H. TOWNSEND V. A. N. AND N. A. WHITE, Appellants,
and GEORGE AND MARY HAVER.**

STATUTE OF FRAUDS: ORDER OF LIENS. An agreement by a vendor, that his vendor's lien shall be subordinate to a mechanic's lien for material to be furnished to the purchaser for improving the
1 property, is not a contract for the transfer of an interest in real estate, within the inhibition of the statute of frauds against verbal contracts for such purposes; nor is it within the statute as an agreement to answer for the debt of another.

Judgments: LIENS. Plaintiff, in an action to establish a lien against a wife's property for material furnished under a contract with her husband is entitled to a judgment establishing his lien as a mechanic's lien, and not as a mere equitable lien, where the hus-
2 band and wife make default and a mortgagee of the property who contests the priority of the lien over his mortgage does not question that if plaintiff's lien is to be established, it should be established as a mechanic's lien.

Appeal from Cass District Court.—HON. W. R. GREEN,
Judge.

WEDNESDAY, MAY 26, 1897.

A. N. AND N. A. WHITE sold to Mary M. Haver, wife of George Haver, ten acres of land, for the agreed price of six hundred and fifty dollars, no part of which was paid, and for the security of which a vendor's lien existed. The plaintiff furnished the material to erect a house and barn on the land, and this action is to establish a lien for the material so furnished, as prior to the lien of A. N. and N. A. White. A. N. and N. A. White, by cross-bill, seek a foreclosure of their lien, and the question is presented as to which lien takes priority. The district court denied to plaintiff a mechanic's lien, but gave to him an equitable one, with priority over the lien of the defendants White, and established a lien in favor of each. Defendants White appealed from the order giving plaintiff a priority, and plaintiff appealed from the order denying the mechanic's lien.—*Reversed* on plaintiff's appeal, and *affirmed* on defendant's appeal.

Dowell & Parrish for appellants White.

White, Swan & Bruce for appellant Townsend.

GRANGER, J.—I. The parties are not in dispute but that the vendor's lien would take priority in the absence of particular facts to change the rule. The claim of plaintiff is that, before he furnished materials, he had an agreement with the defendants White that he should furnish the material for the buildings, and that his lien should be prior to any interest of theirs, and that he furnished the materials in pursuance of such agreement. The parties are in dispute as to this proposition of fact. We conclude from the evidence that such was

the understanding. It is probably true that the word "lien" was not used, but one of the Whites was the first to see and talk with plaintiff about furnishing the materials. They had sold the land without any payment, and were desirous of having the improvements made, and the talk was that plaintiff should furnish the materials, and should be first paid. This was clearly the understanding and that is not denied. We have no doubt that plaintiff understood, and that defendants White did understand, or at least should have understood, that the land should stand first as a security for plaintiff's claim. The language must be viewed in the light of the surroundings and the reasons for making the preference as to payment. It is not important to elaborate the point. It is one of fact, and we are not in doubt as to it, as the evidence is presented.

II. It is, however, said that the evidence to show the fact of such agreement is incompetent, because it is oral, and the promise is to answer for the debt of another. We can hardly see how. The trans-
1 action does not seem to us to bear any relation to the statute of frauds. There was no debt when the agreement was made, nor was there any agreement to pay a debt. It is also said the evidence was incompetent, because the contract was for the transfer of an interest in real estate. What interest? The defendants had their vendor's lien, and they have it yet. They, by their agreement, permitted another lien, if it should attach, to be prior to it. No conceivable interest in the land was transferred. The sale of the land by defendants and the agreement with plaintiff were so near in point of time that they may be said to be simultaneous. In no sense can there be said to have been any transfer of an interest in real estate. The interests or liens are preserved just as they attached under the agreement.

III. It appears that the title to the land is in the wife, and the contract for the lumber was made with her husband, and, as we understand, because of the situation of the title, the district court established an equitable, instead of a mechanic's lien. The defendants White do not question, if a lien is to be established, that it should be a mechanic's lien; and the defendants Haver are in default, and have at no time questioned the right to such a lien. This situation makes it unnecessary to give reason for our conclusion, and we simply state it, that a mechanic's lien should have been established in favor of plaintiff. On plaintiff's appeal the judgment is REVERSED. On defendant's appeal it is AFFIRMED.

E. A. WADLEIGH v. F. D. McDOWELL & COMPANY,
Appellants.

Contracts: WARRANTY: Practice. Defendant cannot defeat an action for goods sold and labor performed in roofing a house under an understanding that the labor and material should be paid for, at least in part, by proof of a breach of warranty by the plaintiff in respect to the old roofing; but his remedy is confined to a claim for damages for the breach.

Appeal from Clinton District Court.—HON. P. B. WOLFE,
Judge.

WEDNESDAY, MAY 26, 1897.

ACTION for goods sold and labor performed. Trial to jury; verdict and judgment for plaintiff; and defendants appeal.—*Affirmed.*

Hayes & Schuyler for appellants.

No appearance for appellee.

LADD, J.—In February, 1893, the plaintiff placed sixty-two rolls of roofing paper, of the reasonable value of one hundred and eighty-six dollars, on the defendants' building, and this action is brought to recover therefor. For answer, the defendants allege that in 1891 the plaintiff placed roofing on the same building, receiving payment therefor, and warranted it to be of good material, and that it would last for five years; that it was not as represented and would not turn water; and that plaintiff, having failed to remedy the defects, furnished the roofing in controversy in order to comply with his warranty. No counter-claim was pleaded. The court told the jury that the burden was on the defendant to establish the warranty, and the breach thereof, and that the old roofing was practically worthless, and that plaintiff put the second roof on the building in order to comply with his warranty. The appellants insist that it was only incumbent on them to establish a warranty, and that the roof was placed to comply with it. This contention is argued on the assumption that the evidence is other than appears from the record. The evidence of defendants tends to show that the plaintiff repaired the roofing several times without charge, and then said, if he did not make it good, he would put on a new roof. Bentley says: "We were obliged to have a new roof right away, and we agreed to pay Mr. Wadleigh extra for it." McDowell testified: "A short time preceding the putting on of the second roof, I went to see the plaintiff, and he went with me on the roof, and he said it could not be made good, and that he would put on a new roof, which he proceeded to do, and which is the roof mentioned in this case." The plaintiff testified that he told Bentley: "I will put a roof on there if you request it, but at your expense." And Bentley said: "They had got to have it, and to put it on." He then put

on the roofing. This is undisputed. Bentley and McDowell compose the defendant firm. So that, by the undisputed testimony, it is shown the second roofing was not placed in order to comply with any warranty, but upon agreement between plaintiff and a member of the firm that it should be paid for at least in part. Certainly, under these circumstances, the appellants have no just ground of complaint, and, in any event, were not entitled to the relief asked, unless it appeared the first roofing was worthless. The naked promise to put new roofing on the building was without consideration, and plaintiff was not bound thereby, unless he so did, in pursuance of the promise. If the first roof was of some value, and there was a warranty, and a breach thereof, the defendants' remedy was in a claim for damages, and not in an attempt to defeat the recovery for the second roof furnished, with the understanding that it should be paid for, at least in part. Other exceptions are based on the same assumption, that the evidence was different than appears on the record before us, and requires no consideration. The objections to the rulings on admissibility of evidence are without merit. A party will not be permitted to make out his defense by improper cross-examinations. There appears no prejudicial error, and the judgment must be AFFIRMED.

JOHN M. DAY V. MARY E. BRENTON, CLIDE E. BRENTON,
CHARLES R. BRENTON, EVA A. BRENTON, and CHARLES
R. BRENTON, and CLIDE E. BRENTON, Executor,
Appellants.

Mortgage: RELEASE: *Innocent purchaser.* A purchaser in good faith of land conveyed by a deed of trust, who relies upon the
1 recorded satisfaction by the trustee of the notes and deed of trust, purporting to be executed after the notes had matured and reciting the receipt of payment, is entitled to protection against the

- cestui que* trust or their assignees, although the notes had not in fact been paid and the trustee had therefore no authority to satisfy the deed. Citing *Field v. Schieffelin*, 7 John. Ch. 150; *Ahern v. Freeman* (Minn.) 71 N. W. Rep. 538; *Merrill v. Luce* (S. D.) 61 N. W. Rep. 43; *Whipple v. Fowler* (Neb.) 60 N. W. Rep. 19; *Jones v. Clark*, 25 Grat. 656; *Carter v. Bank*, 36 Am. Rep. 341; *Weldon v. Tollmann*, 15 C. C. A. 138 (67 Fed Rep 986).

SAME: Release by trustee. Where one of the joint owners of land assumes a mortgage subject to which it was purchased, and gives
 1 to one of his co-owners a trust deed to secure payment thereof, a
 decree, in a suit between the grantor in such trust deed and the
 trustee for partition and an accounting, that such grantor was
 3 bound to pay the mortgage and that on payment thereof "the
 clerk of the court" should satisfy the trust deed, does not deprive
 the trustee of power to satisfy it, the beneficiaries not being
 parties.

SAME. Since the right of the trustee to satisfy the trust deed could
 1 not be abridged in such suit, its pendency did not affect the rights
 3 of one purchasing the land, relying on the satisfaction by the
 trustee.

SPLITTING CAUSE OF ACTION. A mortgagee who forecloses his mortgage in an independent suit without asking to recover for taxes
 4 paid under a provision of the mortgage, cannot assign the claim
 for taxes and vest in his assignee the right to recover them, as
 that would allow the splitting of a cause of action.

Appeal from Polk District Court.—HON. C. P. HOLMES,
 Judge.

THURSDAY, MAY 27, 1897.

SUIT in equity to foreclose a deed of trust, in the nature of a mortgage, made and executed by Pat and Mary Kenney, to Peter A. Johnson, covering certain land in Dallas county. Defendants, who are the widow and heirs at law of W. H. Brenton, deceased, claim that decedent was a purchaser of the premises for value, and without notice, and that, at the time he purchased, the deed of trust was apparently satisfied and released of record by Peter A. Johnson, the trustee named therein. The lower court gave plaintiff a judgment and decree, and defendants appeal.—*Reversed.*

White & Clarke for appellants.

Dudley & Coffin for appellee.

DEEMER, J.—The deed of trust in suit conveyed the property to Peter A. Johnson, of Polk county, subject to these conditions: "That if the said Patrick Kenney, his heirs, executors, or administrators, shall pay or cause to be paid to the Iowa Loan & Trust Company, their executors, administrators, or assigns, the sum of one thousand dollars, on or before the first day of November, 1886, and to James Lamb three hundred and eighty-six dollars and sixty-one cents on or before the twenty-first day of March, 1884, and sixty-three dollars and thirty-four cents accrued interest, and taxes for 1882, with interest thereon according to the tenor and effect of the promissory notes given to said Iowa Loan and Trust Company, given with the mortgage by James Lamb, and assumed by Johnson and Kenney, and to be paid by P. Kenney, as shown on said notes, then these presents to be void; otherwise to remain in full force." Appellee claims to be the owner, by indorsement, of the note referred to in these conditions, as payable to James Lamb; and this suit is for judgment on that note, and to foreclose the deed of trust. After the execution of the deed of trust, and on or about the thirteenth day of November, 1886, Peter A. Johnson, the grantee named therein, made a satisfaction piece, acknowledging that the same was "redeemed, paid off, satisfied, and discharged in full." This satisfaction was duly filed for record with the recorder of Dallas county. Johnson had no authority, express or implied, from appellee, who then held the Lamb note, to enter this satisfaction of record. Thereafter W. H. Brenton purchased the property, relying upon the

recorded satisfaction of the mortgage, and believing that the Lamb note had been paid. Appellee contends that the deceased was not justified in relying upon the satisfaction for two reasons: (1) Because the authority of the trustee was expressly limited to an actual payment of the debts by Kenney to the person or persons who held the notes described in the instrument; and (2) because of a decree entered of record in a suit wherein Peter A. Johnson, by his next friend, was plaintiff, and Pat Kenney was defendant, wherein it was determined that, as between them, Kenney was bound to pay the notes secured by the deed of trust, and further decree "that upon the release of said mortgage to the Iowa Loan and Trust Company, and the payment of said note to James Lamb, or the release of the surety now on said note, that the clerk of this court enter satisfaction of the mortgage made by Pat Kenney and Mary Kenney to Peter A. Johnson, dated March 21, 1893."

To properly solve the questions presented, a further statement of the facts is necessary. It appears from the record that Lamb sold the land covered by the mortgage to G. I. Johnson, the father of Peter A. Johnson, and the father-in-law of Pat Kenney. At the time of the sale, the Iowa Loan and Trust Company held an unsatisfied mortgage upon the property. Johnson, the father, agreed to pay Lamb one thousand, four hundred and fifty dollars; one thousand dollars of which was covered by an assumption and agreement to pay the Iowa Loan and Trust Company mortgage, and the remainder to be paid to Lamb. He caused the land to be conveyed (by Lamb) to his son and son-in-law, and Kenney agreed to pay the consideration to Lamb. Kenney thereupon executed his note to Lamb for the amount stated in the deed of trust, and G. I. Johnson signed the same as surety. He also assumed and agreed to pay the mortgage to the Iowa Loan and

Trust Company, and at or near the same time, and to indemnify G. I. Johnson and Peter A. Johnson, who owned one-half the property covered by the company mortgage, executed the deed of trust in suit. Afterwards some controversy arose between Peter A. Johnson and Kenney with reference to their rights in and to the premises, and Johnson brought suit against Kenney for partition, and for an accounting between them. In this suit it was decreed that Peter A. Johnson and Pat Kenney were each the owners of an undivided one-half interest in the land; that Kenney was individually bound to pay the mortgage to the trust company and the note in favor of Lamb; and that the mortgages, as between them, were liens upon the land set apart to Kenney, to be first paid therefrom; and further decreed that upon release of said mortgage to the trust company and payment of the note to Lamb, or the release of the surety on the note, the clerk enter a satisfaction of the mortgage made by Kenney and wife to Peter A. Johnson, being the mortgage or deed of trust in suit. Shortly after the execution of the note to Lamb, and before its maturity, he sold and indorsed it to plaintiff, and some time thereafter executed a formal assignment, referring to the mortgage in suit. Thereafter the loan and trust company foreclosed its mortgage, and sold the land under execution to Jennie A. Rivers, Rivers sold to Collins, Collins to Hoff, and Hoff to Brenton. Neither Collins, Hoff, nor Brenton had any notice of the mortgage in suit, except such as the record imparted, and some of these grantees expressly say that they relied upon the satisfaction appearing of record at the time they purchased. There is some doubt about Lamb's knowledge of the mortgage to Peter A. Johnson until after it was satisfied of record, but, as the case turns upon another proposition, we will not attempt a solution of the doubt.

As we view it, the case turns upon the authority or apparent authority of the trustee to satisfy the mortgage or deed of trust. In addition to the conditions to which we have referred, this instrument provided: "And it is further agreed that if default shall be made in the payment of said sum of money or any part thereof, principal or interest, or if the taxes assessed on the above-described real estate shall remain unpaid for the space of three months, and after the same are due and payable, then the whole indebtedness shall become due, and the said party of the second part, his heirs or assigns, may proceed by foreclosure or in any other lawful mode to make the amount of said note." It is no doubt true that Peter A. Johnson, the trustee, had no authority to release the deed of trust, except upon payment of the notes secured thereby; and it is conceded that, as between the parties, or persons having notice, a release executed by a trustee without authority of the *cestui que* trust, and without having received payment of the debt secured, does not discharge the lien. See Jones, Mortg. section 957; *Insurance Co. v. Eldredge*, 102 U. S. 545; *Williams v. Jackson*, 107 U. S. 478 (2 Sup. Ct. Rep. 814). The trustee did not have authority, in this case, to release the deed of trust except upon payment of the notes secured thereby, but the question here presented is somewhat broader than that of the express power of the trustee. It relates more nearly to his apparent authority, or rather to the effect of the release upon subsequent purchasers, who bought the land on the faith of the satisfaction piece appearing of record. Appellee concedes that the trustee had authority, upon payment of the notes secured by the deed of trust, to release the same. Now, if he had this power, will it not be presumed, in the absence of notice to the contrary, that, when he enters satisfaction of the instrument upon the records after the notes secured thereby have matured, the notes are paid, and

will not a good-faith purchaser of the land who buys relying upon this satisfaction be protected against the claims of assignees of the notes secured by the deed of trust? This is the vital question in the case, and its solution does not depend so much upon the authority of the trustee to receive payment as upon his power over the security and his right or apparent right to discharge the instrument. As it is conceded he had the power, without joining his *cestui que* trust, to release the mortgage upon payment of the debts secured thereby, it seems to us that, when he does do so after the debts mature, subsequent purchasers are justified in assuming that the debts have been paid, and in relying upon the record showing the discharge of the mortgage. The satisfaction made by Johnson, the trustee, was entered of record after the debts matured, and expressly stated that the mortgage or deed of trust was "redeemed, paid off, satisfied, and discharged in full." This is a statement made by one having not only apparent, but real, authority, that the debts have been paid, and that the mortgage is satisfied and released. Must a purchaser go further, and see that the debts were in fact paid?

We are aware that the uniform tenor of authorities is to the effect that a trustee has no powers, except those conferred by the instrument creating the trust, and that those given are strictly construed; and we do not overlook the fact that persons dealing with the subject of the trust must take notice of the extent and limitations of the powers conferred; and we do not desire to intrench upon these well-established and salutary rules. But the question here presented cannot be solved by reference to these rules alone. Here is a case where the trustee has the undoubted authority to discharge the deed upon payment of the debt secured thereby. His appointment is accepted by the *cestui que* trust, and

they say to the world that, upon compliance with certain conditions, he has authority to release the instrument. He does release it, and subsequent purchasers buy, relying upon this satisfaction. Who is to suffer under such circumstances,—the one who puts it in the power of the trustee to make the discharge, or the one who buys on the faith of the deed of trust being satisfied? Application of certain well-known equitable principles will settle this question. Some of these rules have been thus stated: "Where one of two innocent parties must suffer, he through whose agency the loss occurred must bear it." Again: "Where somebody must be loser by reason of a deceit practiced, he who employs and puts trust and confidence in the deceiver should be the loser, rather than the stranger." Again, it has been said: "Where loss is caused by the fraud of a third person, such loss should fall on the one whose act enabled such fraud to be committed." In applying these maxims, we have said that where a mortgagee in a mortgage given to secure a certain promissory note negotiates the note to a third person, and then enters a satisfaction of record, such entry will protect a subsequent *bona fide* purchaser of the land from the mortgagor if he had no notice at the time of such purchase that the note was unpaid, or the entry of satisfaction unauthorized. *Cornog v. Fuller*, 30 Iowa, 212. In another case involving the same question, *Bank v. Anderson*, 14 Iowa, 544, we said that parties should not be permitted to leave their rights and interests in liens and real estate in such a condition as to injure those who are deceived by appearances, without a record notice to guide them. The appellee in this case has no greater or other rights than Lamb, from whom he purchased the note, for he did nothing to indicate that he had any interest in the security. Appellee relies upon the cases of *Weldon v. Tollman*, 15 C. C. A. 138 (67 Fed. Rep. 986), and *Livermore v. Maxwell*, 87 Iowa, 705. These cases are much

alike in their facts, and differ from this in many important particulars. In the *Weldon Case* the release was by quitclaim deed, and did not purport to be a satisfaction of the deed of trust in execution of the powers conferred upon the trustee. And in both cases it appeared that the release was given before the maturity of the notes secured by the trust deed, and in neither were the notes surrendered to the makers. Moreover, it is expressly held in the *Livermore Case* that a subsequent purchaser who in good faith relied upon a satisfaction entered of record by the *cestui que* trust, as well as the trustee, would be protected, although at the time the satisfaction was entered the *cestui que* trust had disposed of the notes secured by the deed. The uniform course of decisions in this state has been to discourage secret liens, and to protect those who invest their money in reliance upon the integrity of the county records. See *Jenks v. Shaw*, 99 Iowa, 604, and cases cited.

Some conflict will be found in the authorities bearing upon the questions here considered, but we think the case turns on the application of a few well defined equitable principles, and that the result reached is in accord with these maxims. See, as sustaining our conclusions, *Field v. Schieffelin*, 7 Johns. Ch. 150; *Ahern v. Freeman* (Minn.) 48 N. W. Rep. 677; *Kuen v. Upmier*, 98 Iowa, 393; *Merrill v. Luce* (S. D.) 61 N. W. Rep. 43; *Whipple v. Fowler* (Neb.) 60 N. W. Rep. 19; *Jones' Executors v. Clark*, 25 Grat. 656; *Carter v. Bank*, 36 Am. Rep. 341.

The decree upon which appellee relies as notice to appellants' ancestor, that Johnson had no authority to release the mortgage, being the one entered in the partition and accounting case of Johnson against

3 Kenney, did not take away from Peter A. Johnson his trusteeship; nor did it in any manner abridge or destroy his right to release the trust deed.

If it purported to do so, it would be ineffectual, for the reason that neither of the *cestuis que* trust was made a party to the proceeding, and the district court could not discharge their trustee, and place the clerk of the courts in his stead, without authority from the beneficiaries, or an adjudication in a case to which they were parties. If we treat the suit as *lis pendens*, it does not aid the appellee, for the reasons stated.

Some question is made regarding certain taxes allowed to appellee, and included in the judgment. As these taxes were all recovered under stipulations contained in the deed of trust in suit and the provisions of the loan and trust company mortgage, we need only consider those paid by the trust company, claim for which was assigned to appellee, as the deed of trust to

Johnson was satisfied in so far as these defendants are concerned. Appellee is not entitled to recover for taxes paid by the loan and trust company for two reasons: (1) They foreclosed their mortgage in an independent suit, and did not ask to recover for taxes paid. Having failed to do so, they cannot assign a claim therefor, and vest in their assignee a right to recover, for this would allow them to split their cause of action and foreclose by piecemeal. (2) Appellee did not ask to recover these taxes under the loan and trust company mortgage, but under the one to Johnson, as trustee; and this, as we have seen, was satisfied of record.

Appellants filed a cross-petition, in which they asked that the deed of trust be decreed to be no lien upon their real estate, and that the same be declared fully canceled and satisfied of record. This relief should have been granted. The decree of the district court is reversed, and the cause remanded for further proceedings in harmony with this opinion.—REVERSED.

ESTELLA D. MARKLEY V. GEORGE B. OWEN, Appellant,
ELIZABETH D. HIGGINS, Intervener.

Action for New Trial: APPEAL: *Bill of exceptions.* Code, chapter 1, title 19, sections 3155, 3158, providing that petitions for new trials shall be tried "as other actions by ordinary proceedings," applies whether the original action was an ordinary or an equitable proceeding, unless the parties otherwise agree; and hence, the minutes of the evidence taken in the proceedings for new trial, though certified to by the judge, cannot be considered on appeal, unless signed and filed during the term, or in such time thereafter as may be fixed by the court, as required in respect to a bill of exceptions.

Appeal from Cedar Rapids Superior Court.—HON. T. M. GIBERSON, Judge.

THURSDAY, MAY 27, 1897.

ACTION to quiet title to real estate. Decree for plaintiff, and the defendant appealed.—*Affirmed.*

W. F. Fitzgerald and Jamison & Smyth for appellant.

Rickel & Crocker for appellee.

GRANGER, J.—The action is by the plaintiff to quiet her title to eighty acres of land. Defendant Owen, as trustee, appears, claiming title as such. Intervener, Higgins, represents herself as a mortgagee of plaintiff, and thus interested in the land, and unites with the plaintiff in sustaining her title. A decree was entered for plaintiff October 30, 1894. November 16, 1894, the defendant filed a petition for a new trial on the ground of fraud practiced by the plaintiff in obtaining the judgment, and because of newly-discovered evidence. This issue was tried, and March 13, 1895, the court denied the

petition for a new trial, and the defendant appealed from the judgment for plaintiff, and from the order refusing a new trial.

I. The record is presented here by a bill of exceptions embodying the two proceedings, the evidence being preserved separately, and plaintiff presents a motion to strike from the abstract the evidence purporting to be taken in the proceedings for a new trial, on the ground that the judgment therein appealed from was in an ordinary proceeding, and the bill of exceptions was not settled at the term in which the cause was tried, and no time beyond the term was granted by consent or by order of the court. There seems to be no dispute about the facts of the bill of exceptions being settled after the term, and without an order or agreement. There is, however, in the bill of exceptions, a certificate of the judge sufficient to preserve the evidence under the rule applicable to equity cases, and we meet the contention whether issues upon a petition for a new trial are to be tried as ordinary or equitable actions. Appellant makes no question but that in cases where the principal action is an ordinary one the other is also. But he urges that, where the principal action is by equitable proceedings, so must the proceeding for a new trial be. The proceeding for a new trial is under chapter 1, title 19, of the Code, the import of which is not, in all respects, clear. Section 3155 is of that chapter, and, after providing for the commencement of the proceeding, and the formation of the issues, it is said: "The case shall be tried as other cases, by ordinary proceedings, but no petition shall be filed more than one year after final judgment was rendered." The following is section 3158, also in the same chapter: "In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service, and mode of return, and the pleadings shall be governed

by the principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that defendant shall introduce no new cause, and the cause of the petition shall alone be tried." These two sections contain the only language of the chapter indicating the character of the proceedings under it. There is some reason to think that section 3155 has reference more especially to the first subdivision of section 3154, see *Carpenter v. Brown*, 50 Iowa, 451, and that section 3158 refers to sub-divisions 4, 5, 6, 7, and 8 of the section; but, without fixing the precise applicability of the different sections, it will be seen that the two provisions, as to the mode of trial, comprehend all actions under the chapter. This, with the absence of a reference to a trial by equitable proceedings, makes the legislative intent quite apparent. The most that is determined in *Hintrager v. Sumbargo*, 54 Iowa, 604, is that, where a case is tried below as an equitable action, it will be so tried in this court. In *Carpenter v. Brown*, *supra*,—a law action,—we held that the proceeding for a new trial was by ordinary proceedings, and that it was triable to the court without a jury. See, also, *Kruidenier v. Shields*, 77 Iowa, 504; *Mortell v. Friel*, 85 Iowa, 739, is an equity case, and there was a proceeding like this for a new trial, and we cited the case of *Carpenter v. Brown*, *supra*, and applied the rule of its being an ordinary proceeding. It seems that both the language of the statute and its application in this court sanction the rule that such cases, whether the original case is at law or in equity, are triable as ordinary actions, unless the parties in some way assent to a trial by the other method. There is some claim that this case was tried as an equitable action. The record does not show that as a fact, but we

think it otherwise appears. The parties, by a stipulation, fixed the time for trial, and that it should be "before the court," which probably signifies but little, as the trial must have been to the court in any event. The judge's certificate to the evidence is, practically, in two parts; the first being as to the principal case, where it is expressed that it was tried as an equity case. He then certifies anew as to the other proceeding, with much the same form and language, but with no statement that it was tried otherwise than as the law directs,—as an ordinary action. Under such a condition of the record, we cannot assume that it was tried in any other manner. To make the minutes of the evidence, certified to by the judge, answer for the bill of exceptions, it must have been signed and filed as is required in regard to a bill of exceptions; that is, during the term, or in such time thereafter as may be fixed by order of the court or by consent. See *Bunyan v. Loftus*, 90 Iowa, 122; *Drake v. Fulliam*, 98 Iowa, 339. It does not so appear, and we think the motion to strike the evidence must be sustained. With the evidence out of the record, there is nothing to be considered on this branch of the case.

II. It remains to consider the original case on the merits, unaffected by the proceedings for a new trial. Most of appellant's argument is devoted to the appeal from the order denying a new trial. It seems to us the effort for a new trial was to make good what appeared to be a hopeless case on the original hearing. The evidence is largely documentary,—that is, the important part of it,—and it seems to us to very conclusively show the title of the land in question in the plaintiff. She has occupied it since 1876, under a contract of sale, and, unless there is rank perjury, the land has been fully paid for. We will not elaborate the evidence or facts, for it would do no good. We simply announce our conclusion that the judgment must stand AFFIRMED.

102	496
107	521
102	496
109	412
102	496
114	66
102	496
135	274

JULIA McDONALD V. FRANCHERE BROTHERS, A. FRANCHERE, N. F. FRANCHERE, and G. FRANCHERE,
Appellants.

Principal and Agent: ASSAULT BY CLERK. A clerk, undertaking to obtain from a customer an article that he believed was stolen, is
1 so acting within the scope of his employment as to render his employers liable for an assault thereby committed.

SAME. A clerk who touches a customer, and requests her to enter another room, and there accuses her of taking an article, commits
3 an assault, under the definition of the instruction, "an assault is the touching, or attempting to touch, the person of another in an angry, violent, or rude manner."

Opinion Evidence: MENTAL PAIN. A witness need not be an expert
4 on the human mind and mental diseases to render him competent to testify to manifestations of mental pain and anguish by another.

Construction of Pleadings: PARTNERSHIP. The title of a petition set out as parties defendant the name of a firm, followed by the names of three individuals who were proven to the members
2 of the firm, and the amended petition alleged that the defendant named as a firm was a co-partnership, and the individual members did not deny liability as members of the firm *Held*, that the pleading was sufficient to sustain a judgment against the co-partnership and the individuals thereof.

Appeal from Linn District Court.—HON. WILLIAM G. THOMPSON, Judge.

THURSDAY, MAY 27, 1897.

THE plaintiff in her petition entitles this action as above, and alleges as follows: "That, on or about the twenty-fourth day of December, A. D. 1894, the plaintiff was in the defendants' place of business, in the city of Cedar Rapids, Iowa, for the purpose of making certain purchases; that while she was there, behaving in all respects properly, and doing nothing which would excite any suspicion in the mind of any prudent person,

the said defendants wrongfully and maliciously, and without any just or probable cause whatever, assaulted the plaintiff, and forcibly compelled her to go into an adjoining room, and there submit to being searched, forcibly and against her will; that by reason thereof plaintiff has been put to great shame and disgrace, caused great mental suffering and anguish; and that defendants by reason thereof caused it to be believed and suspected that plaintiff had committed the crime of larceny." In an amendment she alleges "that the defendants, Franchere Brothers, is a co-partnership." She asked to recover ten thousand dollars damages. The defendants answered, denying every allegation in the petition, "except that they admit and allege that the firm of Franchere Bros. is a co-partnership, as alleged in plaintiff's petition." They further allege probable cause and other facts in mitigation of damages. A verdict was returned in favor of the plaintiff for five hundred dollars, and judgment rendered thereon. Defendants appeal.—*Affirmed.*

John M. Redmond for appellants.

Rickel & Crocker and *J. H. Crosby* for appellee.

GIVEN, J.—I. The evidence shows without conflict that, on the evening of the twenty-fourth day of December, 1894, the plaintiff was in a store in Cedar Rapids, Iowa, known as "The Fair"; that one
1 Raymond Jones, employed as a clerk in said store, suspecting or believing that plaintiff had unauthorizedly taken a pepper caster from a counter in the store, asked her to go to another room, which plaintiff did. When in the other room said Jones accused plaintiff of having the pepper caster, or asked her if she had taken it. There is a conflict in the evidence as to

what took place at the time Jones asked or told the plaintiff to go to the other room, and as to who was present, and as to what took place in the other room.

2 Appellant's first contention is that there are no pleadings nor proofs that there was such a firm as Franchere Bros., December 24, 1894; as to who constituted such a firm at any time; that such a firm owned or were proprietors of "The Fair" on December 24, nor that the proprietor or proprietors of "The Fair" employed Raymond Jones on December 24, 1894. The petition is certainly not explicit as to any of these matters, and yet, in view of the title given to the case and the allegations which follow, it fairly appears therefrom that Franchere Bros. were a partnership on December 24, 1894; that A. Franchere, N. F. Franchere, and G. Franchere constituted the firm, and were the proprietors of the store in which the alleged wrong was inflicted. The co-partnership, and the three individuals named, were joined as defendants, and as such answered, none of them denying liability as a member of the firm. The jury was warranted, under the evidence, in finding that the three defendants named constituted the defendant firm; that the firm was the proprietor of the store known as "The Fair" on December 24, 1894, and that Raymond Jones was then in the employ of that firm. The several assignments of error based upon this contention are not well founded.

II. Under the law, the defendants, as employers of Raymond Jones, are bound by his acts within the scope of his employment. *McKinley v. Railway Co.*, 44 Iowa, 318. Appellant insists that the acts of Jones complained of are not shown to have been within

3 the scope of his employment. We have examined this evidence with care, and think the jury was warranted in finding that what Jones said and did to the plaintiff was within the scope of his employment.

Appellants also contend, in this connection, that what Jones did does not constitute an assault. The court instructed that "an assault is defined by the law as the touching, or attempting to touch the person of another in an angry, violent or rude manner." No complaint is made of this instruction, and we think the jury was warranted in finding, in the light of this definition, that an assault was committed upon the plaintiff. Counsel discuss the question whether defendants ratified the acts of Jones. As we view the case, this question is not involved in it, and the arguments need not be further noticed.

III. Plaintiff's husband was permitted to testify, over defendants' objection, that when his wife came home that evening she was agitated; crying, and appeared to be worried, and that she continued to act in that manner for several months. The ground
4 of appellant's objection is that "it is not the law that a witness may testify as to the mental condition of a person without a previous showing of special training and experience in the study of the human mind and mental diseases." The court, in instructing as to damages, told the jury that it should take into consideration any mental pain and anguish that the plaintiff suffered. This instruction is not objected to, and the evidence complained of was directly to that point. It is not required that a witness must be an expert to be entitled to testify to manifestations of mental pain and anguish. The case seems to have been fairly tried, and the findings of the jury to be warranted by the evidence. We conclude that the judgment of the district court should be **AFFIRMED**.

A. D. PARKER v. W. D. PARKER AND D. S. PARKER,
Appellants.

Malicious Prosecution: EVIDENCE OF MALICE. In an action against W and another for malicious prosecution, it appeared that W owned a farm leased to plaintiff; that plaintiff cut some dead timber on the land used as a pasture, and hauled two loads near the house; that defendants unsuccessfully prosecuted him for wilful trespass; and that, prior to the alleged trespass, W and an attorney tried to induce plaintiff to surrender the lease he then had, and take a new one with different conditions. *Held*, that it was proper to admit evidence that the attorney then told plaintiff in W's presence, that, if he complied, he would avoid litigation which would cost plaintiff so much that he would leave the farm without a dollar, and that litigation followed; and it was also proper to admit evidence that the other defendant sued plaintiff and had threatened to harass and annoy him with litigation.

SAME. Plaintiff in an action for malicious prosecution based upon his arrest for an alleged wilful trespass in cutting down and removing timber injured by a cyclone on land rented from defendant, may testify that his object was to make the land available for pasture, for the purpose of negating a wilful removal of the timber.

SAME. Evidence that defendant in an action for malicious prosecution, prior to the acts on which action is based, advised an employee of the plaintiff, who was a stranger to him, to leave such employment, and offered to obtain him another job, is admissible on the question of motive in causing the arrest, where the parties are brothers.

SAME. Malice essential to an action for malicious prosecution may be, but is not necessarily to be, inferred from want of probable cause.

SAME. The slight value of timber cut and removed from land is relevant upon the question of motive in an action for malicious prosecution based upon an arrest for an alleged wilful trespass in the cutting and removal of such timber.

ADVICE OF COUNSEL. Defendant, to avail himself of the advice of an attorney to rebut the charge of malice, need not lay all the facts before him, but he must lay before him all the facts within his knowledge, and which he could ascertain by the exercise of reasonable diligence.

102	500
102	690

102	500
122	323

102	500
127	157

102	500
129	74
e129	130
130	338

102	500
142	340

102	500
144	98
144	541

Evidence: TRAMPS AS WITNESSES. That a witness is a tramp is not
5 ground for excluding his evidence.

Trespass: WILFUL DEFINED. The term "wilful" in Code, section
8983, making it an offense to wilfully commit a trespass by cut-
ting down timber on another's land or carrying the same away,
8 does not necessarily involve an intent to injure the owner of the
land, but it is sufficient if the accused knew that the act was a
violation of the owner's rights, or was careless as to whether it
was or not.

Appeal from Calhoun District Court.—HON. Z. A.
CHURCH, Judge.

THURSDAY, MAY 27, 1897.

ACTION for malicious prosecution. Trial to jury.
Verdict and judgment for plaintiff, and defendants
appeal.—*Reversed.*

O. J. Jolley for appellants.

D. M. Kelleher and Botsford, Healy & Healy for
appellee.

LADD, J. — The defendant W. D. Parker leased to
his brother, the plaintiff, his farm, consisting of two
hundred and forty acres, near Pomeroy, Iowa, for a term
of three years, beginning March 1, 1893. There was a
grove of timber trees on this farm about sixty rods from
the house. On July 6, 1893, a cyclone swept
1 through that section, twisted some of the trees
off, tore others out by the roots, and broke and
slivered the tops and trunks of many more. Grass grew
in the grove and it was used as a pasture. On December
6, 1894, the plaintiff and his employes entered the grove,
and during the forenoon cut the dead timber,—that
torn and twisted, and the tops, when dead,—but did not
cut the thrifty, growing trees. One load, at least, was
hauled to the house. About 2 o'clock in the afternoon the
defendants drove to the grove, and W. D. Parker warned

the plaintiff to cut and haul away no more timber. The employes finished cutting one tree, and thereafter trimmed some that had been cut down, and hauled another load to the house. About 3 o'clock the defendants filed an information with a justice of the peace, charging plaintiff with the crime of wilful trespass, committed by cutting down, destroying, and carrying away timber or wood growing or being on the land of another, alleging the value thereof to be one hundred dollars, which was afterwards reduced by amendment to forty dollars. The plaintiff was arrested and released on his own recognizance. On hearing, he was acquitted, and the costs taxed to the prosecuting witness. In this action he claims damages on the ground that the prosecution was malicious and without probable cause.

I. Evidence is admissible tending to show the relation existing between the parties prior to the prosecution. It appears that W. D. Parker, with an attorney, visited plaintiff for the purpose of inducing him
2 to surrender the lease he then had, and take a new one, with different conditions; and, in the course of the conversation there, the attorney, in presence of defendant, told plaintiff, in substance, that he had better comply, and thus avoid litigation which would cost the defendant one or two thousand dollars, and the plaintiff so much that he would leave the farm without a dollar. The object of the visit was not attained, and litigation did follow. Evidence of this conversation, and of the fact that suit was brought in pursuance of the veiled threat to do so, was certainly admissible, as tending to show the feelings of the defendant. Brothers rarely engage in litigation, and when they do it is usually the result or occasion of ill will and hostility. Evidence was also admitted tending to show that D. S. Parker sued the plaintiff, and that he had threatened to harass and annoy him with litigation. It was properly received. The mere fact of a civil action being brought

by one party against another might not indicate any ill feeling, but, when previously threatened, and the parties are closely related and not on friendly terms, would tend to explain the motive in subsequently beginning a criminal prosecution without reasonable cause.

II. The court allowed plaintiff to testify that he was clearing out the grove so that he could use the land for pasture, and not for the purpose of burning the wood.

The only fact tending to show what the plaintiff
3 intended to do with the wood was the hauling of two loads near the house. Doing this did not remove it from the farm, but to another locality on the same premises. Knowledge of his object in doing this would aid the jury in determining whether he was wilfully carrying away or destroying the timber as charged.

III. One Bower testified that, while he was in the employment of plaintiff, D. S. Parker advised him to be careful about getting his money, and told him of a place
4 where he was sure to get it. Afterwards, both defendants told him of a man wanting help and advised him to quit working for plaintiff. Bower was a stranger. That defendants should interest themselves to induce help to quit the employment of plaintiff can be explained in no other way than by attributing their action to ill feeling. For the purpose of showing
5 this, the evidence was admissible. The main objection urged by appellants is that Bower was a tramp, and unreliable. That he was a man without a home or occupation might well be considered by the jury in weighing his testimony, but would hardly justify the court in excluding it.

IV. The court told the jury that "the law is that malice may be, but is not necessarily, inferred from such want of probable cause." The appellants say that want
6 of probable cause is only a circumstance to be considered with other evidence as tending to show malice, but is not sufficient in itself. It would seem that this question ought to be at rest. An

intelligent being is presumed to do and act for some purpose, and, if he prosecutes another without reasonable cause for believing him guilty of the offense charged, his motives are the subject of just suspicion. They may be proper, but, under such circumstances, are not so presumed, nor are they presumed to be improper. The jury are permitted to determine the purpose and design of the prosecutor from the circumstances attending the prosecution. These are sometimes such as to conclusively establish an honest purpose, but, ordinarily, the motive of the prosecutor is the subject of inference from want of probable cause. The instruction correctly stated the law. *Center v. Spring*, 2 Iowa, 393; *Paukett v. Livermore*, 5 Iowa, 277; *Ritchey v. Davis*, 11 Iowa, 124; *Smith v. Howard*, 28 Iowa, 51; *Walker v. Camp*, 63 Iowa, 627; 2 Greenleaf, Ev. section 453; Newell, Mal. Pros. 247.

V. The court instructed the jury that the value of the timber claimed to have been carried away or destroyed might be considered in determining the animus of the plaintiff, and the motive of the defendants in filing the information. There was evidence
7 tending to show that W. D. Parker had offered to sell all the injured timber in the grove for five dollars, and all that was cut and hauled did not much exceed such amount in value when reduced to cord wood. In the apt words of Judge Beck in *Olson v. Neal*, 63 Iowa, 214: "The facts of the transaction should be known, and the value of the timber which was the subject of the trespass was a material fact which would aid in determining the animus of the plaintiff in taking it, and the motive of the defendant in instituting the prosecution. Men do not usually commit wilful trespass, subjecting them to punishment, by taking property of inconsiderable value; nor do they in good faith, for the purpose of vindicating the law, institute prosecutions against others

for such offenses where the injury is trifling." See *Woodworth v. Mills* (Wis.) 20 N. W. Rep. 728. The language quoted is especially applicable to this case.

VI. In instruction 10 the court told the jury that, in order to find that the defendants had probable cause for beginning the prosecution, it must appear that they honestly believed that W. D. Parker owned the
8 land and timber thereon, and that plaintiff entered the land, knowing he had no right so to do, and that "the defendants, W. D. Parker and D. S. Parker, honestly believed that plaintiff was trespassing upon the land, and was destroying and carrying away the timber, and that he was doing so wilfully, and with the intent to injure the defendant W. D. Parker." We do not think this is a correct statement of the law. Section 3983 of the Code, in so far as applicable, is, "If any person wilfully commit any trespass by cutting down or destroying any timber or wood, standing or growing on the land of another; or by carrying away timber, or wood, being on such land," he shall be punished. "Wilful," as used in a penal statute, is not synonymous with "voluntary," nor does it necessarily involve the element of malice. In construing a statute, the object to be reached must be considered. At common law, a mere trespass was not indictable, and civil action was the only remedy, which in many instances proved entirely ineffectual. Fences might be thrown down, timber cut or destroyed, or other injury done to property, without incurring a penalty, as an indictment for malicious mischief would not lie unless the acts were malicious. To better protect the owner in the enjoyment of his property, the law was so modified as to eliminate malice as an essential ingredient of the crime. And yet, with this out, it could not have been the purpose to punish for intentionally, though innocently, doing an act. It is therefore uniformly held that the

term "wilful," in such statutes, not only means intentionally or deliberately done, but with a bad or evil purpose, as in violation of law, or wantonly and in disregard of the rights of others, or knowingly and of stubborn purpose, or contrary to a known duty, or without authority, and careless whether he have the right or not. *State v. Massey*, 97 N. C. 465 (2 S. E. Rep. 445); *Savage v. Tullar*, Brayt. 223; *Commonwealth v. Kneeland*, 20 Pick. 206; *State v. Clark*, 29 N. J. Law, 96; *State v. Whitener*, 92 N. C. 798; *U. S. v. Three Railroad Cars*, 1 Abb. U. S. 196; *State v. Preston*, 34 Wis. 675; *Werner v. Flies*, 91 Iowa, 146. Now, some of the standing or growing trees were cut. Doing so wilfully constituted the offense charged in the information. Whether they were thrifty or dead is immaterial, except in determining the purpose. Some of the wood was hauled away. Its destruction was not necessary to complete the offense. But, as its removal was simply from one locality on the leased premises to another, it must appear that the carrying away was with an improper purpose, as for that of appropriation, destruction, or the like. That the land belonged to W. D. Parker, and the lease did not authorize the acts of plaintiff, are conceded. It follows that if the plaintiff intentionally cut or destroyed, or caused to be cut or destroyed, any of the standing or growing wood or trees, and in so doing knew he was acting without right or authority, or did so wantonly or recklessly, and in disregard of the rights of the owner, he was guilty. So, too, if he intentionally carried away any of the trees or wood for his own use, to burn or destroy or otherwise appropriate, and did so knowing the property to belong to another. While an intent to injure the owner would be sufficient to establish a bad purpose, such intent is not necessarily involved. Indeed, the very opposite might be true, and the accused be guilty. To cut out dead or trim live trees might be a positive benefit to the owner

of the land, and the accused so believe; yet if he does this intentionally, and knowing that he has no right to do so, he is guilty of the offense defined in this statute.

VII. Instruction 17 was not applicable. No evidence of the bad character of any witness was introduced. The law does not require a party, in order to avail himself of the advice of an attorney to rebut
9 the charge of malice, to lay all the facts before him, as the jury were told, but only those within his knowledge, and which he could ascertain by the exercise of reasonable diligence. Other exceptions are argued, but are not of sufficient merit to require consideration. Owing to the error referred to, the judgment must be REVERSED.

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W. G. COWLES v. THE CHICAGO, ROCK ISLAND & PACIFIC
RAILWAY COMPANY, Appellant.

Master and Servant: RISK OF EMPLOYMENT: *Contributory negligence.*

A railroad employe, who, in the absence of emergency, goes in front of an engine which has almost reached a turntable, knowing that it is still moving with substantially unchecked speed,
8 assumes the risk of so doing, although it was the duty of the hostler in charge of the engine to stop it and wait for a signal before going on the turn table.

SAME. Where a helper at a roundhouse knew of the existence of a
1 hole in the turntable and had noticed its location every night that he had worked there up to the time of the accident, and
2 entered no complaint, he assumed the risk of working on such defective turn table, though he may have seen the bridge carpenter measuring it; there being no promise to repair.

Appeal from Iowa District Court.—HON. M. J. WADE,
Judge.

FRIDAY, MAY 28, 1897.

ACTION to recover damages resulting from an injury to plaintiff received while in the employment of

defendant. Trial to jury; verdict and judgment for plaintiff; and defendant appeals.—*Reversed.*

Robert Mather, W. T. Rankin, Hedges & Rumble, and Geo. E. McCaughan for appellant.

Remley & Ney and Ranck & Bradley for appellee.

LADD, J.—The plaintiff began work for the defendant at Stuart, Iowa, February 8, 1893, helping at the roundhouse, throwing switches, making fires, and turning the turntable. After February 24 he began work at about 6 P. M., and continued through the night, and his employment was throwing switches, putting engines in and out of the roundhouse, opening and closing doors, and assisting at and turning the table under the direction of the night engineer or hostler. The roundhouse is south of the main track, and there are side tracks to the coal chute, to the clinker pit, the lumber yard, and another called the "spur to the turntable." The roundhouse, with thirty-one stalls, is in the form of an arc, with the turntable in the center. Three tracks run from the yard to this table, which is about sixty feet long and about fifteen feet wide, covered with two-inch plank, and the pit is about five feet deep. The rails on the table are held to those of the approaching track by a clamp, which fits on the top of the flange, goes between the ends of the rails, and is fastened with a pin resting on the outside. As helper it was the duty of plaintiff to see that these clamps were right, and the table in proper condition, before the engine went on. On the Wednesday preceding the injury, and while he was assisting the hostler, Geisenhagen, as helper, an engine ran off the track, and broke a hole in the plank of the turntable, four or five feet long and six to eight

inches wide, some eight or ten inches from the rail on the outside, and within two and one-half feet from the end of the table. The plaintiff continued in the same employment, using the turntable every night, up to the time of the accident, with full knowledge of its condition, without making any complaint, and receiving no promise of repair. He says he saw the bridge carpenter measuring the hole on the night in question, but did not notice anything further done with it. On the night of the injury, Tuesday, July 25, 1893, and about 11:30 p. m., one Adams was hostler, and the plaintiff was acting as helper. The engine was on the coal track, and from there was run on the table, and then taken to the clinker pit, where it was cleaned out; the clamps being left on the rails. The engine started back to the table with plaintiff sitting between it and the tender. When about one hundred feet from the table, and moving at the rate of three or four miles an hour, steam was shut off, and the cylinder cocks opened. There was evidence tending to show that the engine should be stopped before going on the table, and wait for the signal from the helper before proceeding. When twenty or thirty feet from the table, plaintiff says he was directed by Adams to get off and see if the clamps were ready. The plaintiff got off on the left side of the engine, and walked alongside it until it was two or three feet from the table. The engineer did not check it, and the plaintiff stepped around in front of the moving engine, as he says, to see if the clamps were right, and to give the signal to come on if they were right. The engine was so close that to do this he had to step on the table, and when he did so the pilot was within a foot or so and moving slowly. He watched the engine and the table. He was brushed aside by the engine, stepped in the hole referred to, and his hand was caught under the wheel.

I. At the conclusion of the plaintiff's evidence the defendant moved the court to direct the jury to return a verdict for it, on the ground that the negligence of the plaintiff directly contributed to his own injury. This motion was overruled, and, when renewed after the introduction of all the evidence, was again overruled. These rulings only need be considered, as the evidence clearly establishes such contributory negligence on the part of the plaintiff as will preclude any recovery.

2 He knew of the existence of the hole in the table, as he was present when it was made, and noticed its location every night up to the time of the injury. True, he says he saw the bridge carpenter measuring it, but does not claim any repairs were made, or that he was informed these would be. He entered no complaint of the condition of the table, and received no promise of repair. Under the circumstances he assumed all risks incident to its condition. *Greenleaf v. Railroad Co.*, 29 Iowa, 14; *Muldowney v. Railroad Co.*, 39 Iowa, 615; *Perigo v. Railroad Co.*, 52, Iowa, 276; *Money v. Coal Co.*, 55 Iowa, 671; *Wells v. Railroad Co.*, 56 Iowa, 520; *Burns v. Railroad Co.*, 69 Iowa, 450; *McKee v. Railway Co.*, 83 Iowa, 616.

II. When the plaintiff walked alongside the engine, he knew its motion, as well as the hostler. He says he watched it, and also the table, when it was within two or three feet from the table, and so close that he was compelled to get on the table in order to go in front of the engine. Knowing that it was still moving, and the speed not being checked by Adams, he voluntarily went in front of it to look at the clamps on the other side. The excuse offered for so doing,—that it was the duty of the hostler to stop the engine before going on the table and wait for a signal,—will not avail when plaintiff knew the hostler

was not stopping it, and that it was then moving nearly as rapidly as the plaintiff himself. Nor was it a case where the plaintiff was compelled to act in an emergency, for the information he might obtain would be of no possible benefit under the circumstances. Under the repeated adjudications of this court, recovery cannot be had when one voluntarily exposes himself to danger of which he knows, or might have known by the exercise of ordinary care. *Muldowney v. Railway Co.*, 36 Iowa, 462; *Gibbons v. Railway Co.*, 66 Iowa, 232; *Magee v. Railway Co.*, 82 Iowa, 249; *Platt v. Railway Co.*, 84 Iowa, 695. In *Nichols v. Railroad Co.*, 69 Iowa, 154, where plaintiff attempted to couple a stationary freight car to a train of twenty-eight cars backed to it by an engine, and, before the train reached the car, gave a signal to stop the train, which was disobeyed or misunderstood, and, knowing that his signal had been disregarded, went between the moving cars and was injured, he was held to be guilty of contributory negligence. One Oaks stepped between the tender and a car to uncouple them, and, while there, the train was negligently started without a signal from him. He remained between the moving cars, contrary to the rules of the company, and was injured by stepping into a cattle guard, the location of which he knew. It was held that he could not recover, owing to the fact that his own negligence contributed to his injury. *Sedgwick v. Railway Co.*, 76 Iowa, 340. The principle involved in these cases is clearly controlling in that under consideration. Conceding it to have been the duty of the hostler to stop the engine before going on the turntable, yet the plaintiff knew he had failed in this, and, so knowing, went in front of the moving engine, and thereby exposed himself to the perils and dangers of the situation. That party who

last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is solely responsible for it. 1 Shearman & R. Neg. 99. See *Ferguson v. Railway Co.*, 100 Iowa. 733. It clearly appears, from the plaintiff's own testimony that his own negligence directly contributed to his injury, and for this reason he cannot recover.—REVERSED.

F. E. ZALESKY V. THE IOWA STATE INSURANCE COMPANY, Appellant.

Insurance: REBUILDING: *Estoppel of assured.* An insurance company which issues a policy authorizing it to rebuild in case of loss of a building cannot be required to pay the amount of the policy, 8 where it had notified the insured of its intention to rebuild, and the latter made no objections, although the articles of incorporation contain a provision giving the insured a right of election to take his claim in money.

Evidence: INSURANCE. Parol evidence of the action taken by an 1 insurance company in regard to a loss under a policy issued by it, and of its decision to rebuild, is admissible where no record of such 2 action was made; and is relevant in an action upon the policy.

Judgment: ABATEMENT BY. A judgment which is confessedly void 4 will not abate another suit on the same subject matter.

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

TUESDAY, FEBRUARY 9, 1897.

ACTION at law upon a policy of fire insurance. Trial to a jury. The court below directed a verdict for plaintiff, and defendant appeals.—*Reversed.*

McVey & Cheshire for appellant.

J. J. Mosnat and W. C. Scrimgeour for appellee.

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DEEMER, J.—The issuance of the policy in suit, which covered a two-story brick building in the city of Belle Plaine, a meat cutter and an engine and boiler; the destruction of the building by fire, and the giving of proper proofs of loss, are all admitted. The defendant, in defense, pleaded a former suit pending in Lee county, which went to judgment before the commencement of this action. It also pleaded concurrent insurance upon the property, and set out this provision of plaintiff's policy: "The directors shall have the right to rebuild the building or repair the same, and the assured shall furnish to the directors proper specifications of the building destroyed or damaged; and the claim of the assured shall be limited to the actual cost of the building to the assured, or of replacing the same, less a reasonable depreciation for wear and tear and age of the building. If the directors rebuild or repair a building, the assured shall pay to the company the difference in value between the new and old building, and, in case of disagreement, the amount thereof shall, upon demand of either party, be determined as provided by section 14 of the charter. And if there shall be any policies of other companies thereon not contributing to said rebuilding, the assured shall pay to this company the amount thereof, which shall be expended in repairing or restoring the buildings, subject to the foregoing conditions,"—and charged the fact to be that within thirty days after the alleged proofs of loss, this defendant demanded the right to rebuild said building under the terms and conditions of the policy, and demanded of the plaintiff that the assured pay to this company the amount of the other insurance not contributed to such rebuilding, to enable the defendant to expend the same to restore and rebuild the building, or so much as was necessary to rebuild the same, according to the terms of the policy. It also pleaded that by

the terms of its policy its board of directors had three months in which to determine whether to rebuild or not, and that its said board did, within three months, determine to rebuild, and so notified the plaintiff, but that plaintiff refused to comply with the terms of the policy, and refused and neglected to permit defendant to restore the building; and in defiance of his policy, and of defendant's rights thereunder, proceeded to rebuild the building himself. The plaintiff's reply was a plea of estoppel, and practically a general denial of the affirmative matters of the answer.

I. The appellant offered to prove by George Rand, a director of the company, and by one Overton, an adjuster, that at a regular meeting of the directors held on September 21, 1894,—within ten days after proofs of loss were furnished,—they decided to rebuild, and ordered the adjuster to give appellee notice of their decision, and request him to furnish plans and specifications of the building destroyed; that in conformity to the usual and ordinary custom of the directors no record was made of their action in the matter, and that it was usual for the secretary to make up the record of the action of the board only when a loss was fully and finally disposed of. Appellee objected to this evidence on the ground that it was incompetent and irrelevant, and not the best evidence. The court sustained the objection, and of this complaint is made. It will be observed that no record was made of the action of the board, and there was no written evidence of the conclusion arrived at. It rested in the memory of the individuals who were present, and their recollection and statements as to what was done was the best and only evidence attainable. There is no statutory requirement that such matters should be in writing, and we know of no reason for holding that parol evidence is not admissible in such cases. Indeed, it has been so often

held that, where no records are kept, or the proceedings are not recorded, parol evidence is admissible to show what was resolved upon, and by what vote it was carried, that it may be said to be the unanimous voice of authority that such proof may be given. *Ten Eyck v. Railroad Co.* (Mich.) 41 N. W. Rep. 905; *Cram v. Proprietary Co.*, 12 Me. 354; *Bank v. Dandridge*, 12 Wheat. 69; *Dillon, Mun. Corp.* (4th ed.) sections 300, 301; *Poweshiek County v. Ross*, 9 Iowa, 511; *Athearn v. Independent District*, 33 Iowa, 105. See, also, *Lawson's note to Wertheim v. Trust Co.*, 15 Fed. Rep. 727; *Higgins v. Reed*, 74 Am. Dec. 309-312; *Beach, Priv. Corp.* section 295. The evidence offered was not only the best of which the case was susceptible; but it was also competent to establish the facts sought to be proved.

The only other question which remains is, was it relevant? It certainly was, for it went to support one of the defenses pleaded by appellant. It is contended in argument by appellee, however, that the evidence was immaterial, and that no prejudice resulted to appellant from the ruling. This brings us to a consideration of the contract entered into between the

2 parties. The policy sued upon contained these provisions: "And we do therefore promise, according to the provisions of said charter, to pay the said sum insured within the three months next after the said loss shall have been proved by the assured and adjusted by the board of directors, as required by the charter aforesaid during the time this policy shall remain in force, unless the directors within the said three months determine to rebuild or replace the property destroyed. And we do further promise that when, and as often as the property aforesaid, or any part thereof, or any other of equal value built or supplied in the room thereof shall happen to be injured by means of fire, such damage shall be made good according to

the estimate thereof, or repaired and put in as good condition as the same was before such loss or damage happened. * * * And it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings, within a reasonable time, giving notice of their intention to do so within thirty days after the proofs, as herein required, have been received at the office of the company. * * * And in case of loss of a building insured in this company, or any damage thereto, the directors shall have the right to rebuild or repair the same, and the assured shall furnish the directors proper specifications of the building destroyed or damaged, and the claims of the assured shall be limited to the actual cost of replacing the same, less a reasonable depreciation for wear and tear and age of the building. If the directors repair or rebuild a building, the insured shall pay to the company the difference in value between the new and old building; and in case of disagreement the amount thereof shall, upon demand of either party, be determined as provided in section 14 of the charter. And, if there shall be any policies of other insurance companies thereon not contributing to such rebuilding, the assured shall pay to this company the amount thereof, which shall be expended in restoring or repairing the building, subject to the foregoing conditions." The articles of incorporation of the company also contained these provisions: "Sec. 16. The directors shall settle and pay all losses within three months after they shall have been notified and proof of loss is made according to the by-laws and conditions of insurance, unless they shall judge it expedient within that time to rebuild the house or houses destroyed, or replace or restore the property, or repair the damage sustained, which they are empowered to do in a convenient time.

Sec. 17. In case any building or buildings or other property insured in said company be destroyed by fire, and the owner or owners thereof shall prefer to receive the amount of said loss in money, in such case the directors may retain the amount of the premium note given for the insurance thereof, and make assessments thereon, until the time for which insurance was made shall have expired. At the expiration thereof the insured shall have a right to demand and receive such part of such retained premium as has not been expended in losses and expenses." The conditions of the policy, and the first section of the articles of incorporation quoted clearly indicate that the insurer had the right of election to rebuild, and that its decision was final.

It is contended on behalf of appellee that article 17 of the by-laws is in conflict therewith, and that, as it is for the benefit of the assured, that construction must be placed upon the whole contract which is most
3 favorable to the appellee,—according to the universal rule of construction,—and that this gives to the insured the right of election to take his claim in money. Now, while section 17 of the articles of incorporation is not clear, it seems to us that it is not necessarily in conflict with the other provisions and the conditions of the policy before quoted. It has reference particularly as to what shall be done with the premium note in the event the assured receives the amount of his loss in money; and, when construed with reference to the other articles, which are too long to be copied at length in this opinion, it is clear that it has no reference to the liability of the company, nor to the right of the assured to elect to take his indemnity in money. Moreover, the company proceeded in exact accord with the terms of the policy. It elected to rebuild, gave the assured notice of its decision, and demanded plans and specifications of the building. Appellee made no

response thereto, and did not indicate at any time until he had rebuilt the structure and brought this action that he preferred to receive money. At the time the appellant elected to rebuild, and gave proper notice thereof to the assured, it converted the policy into a building contract, and, when thus fixed, all provisions in conflict therewith must yield. *Beals v. Insurance Co.*, 36 N. Y. 522; *Good v. Insurance Co.*, 43 Ohio St. 394 (2 N. E. Rep. 420); *Morrell v. Insurance Co.*, 33 N. Y. 429. Appellee gave no notice to appellant that he intended to rebuild; and there is nothing in the record to show that it had any such notice or knowledge until about the time of the commencement of this action. Under such a state of facts it is clear that, if we give to section 17 the force and effect contended for by appellee, yet, as he did not make his election known, the defendant had the right to proceed as it did, and, having done so, it converted the contract from one of indemnity into a building contract, and the rights of the parties must be determined with reference thereto. We may observe, parenthetically, that the defendant and appellant is a mutual insurance company, and for that reason we have considered its articles of incorporation; as they became a part of the contract between the parties. We think the evidence offered by defendant was material, and that it should have gone to the jury.

II. Appellant also contends that its plea in abatement was a complete defense to the action. It appears that plaintiff recovered judgment in Lee county against the defendant upon the policy in suit. On this
4 judgment he caused execution to issue. Appellant brought suit by injunction to restrain the collection of the judgment, claiming that it was illegal and void for the reason that service was not made upon a proper officer of the company. Appellee, in his reply to appellant's answer, admitted that the judgment was

and is void; and also introduced in evidence a notice signed by plaintiff, and directed to defendant or its attorneys, to the effect that he withdrew his answer, and admitted the allegations of the petition in the injunction suit. Service of this notice was accepted by appellant's attorneys April 30, 1895. This was the day this case was called for trial in the district court. It seems to us that a judgment which is confessedly void cannot be a bar to another action, nor will it abate another suit brought upon the same subject-matter. *Scott v. Luther*, 44 Iowa, 570; *Wixom v. Stephens*, 17 Mich. 518. The court correctly held that the Lee county judgment was no bar to this action.

III. One other question is discussed by counsel, but, as it will not arise upon another trial, we will not consider it further than to say that the case should have gone to the jury under the issues as they stood upon the question as to the amount of defendant's liability. For the reasons pointed out, the judgment of the district court is REVERSED.

SUPPLEMENTAL OPINION ON RE-HEARING.

FRIDAY, MAY 28, 1897.

Overruled.

PER CURIAM.—In a petition for re-hearing, our attention is for the first time called to section 1692 of McClain's Code, which, among other things, provides that "the directors (of insurance companies) shall keep full and correct entries of their transactions, which shall at all times be open to the inspection of the stockholders, and to the inspection of persons invested by law with the right thereof." Assuming, for the purpose of the case, that this statute applies to mutual companies, yet it does not change the rule.

announced in the first paragraph of the opinion, for it is uniformly held that unless such a statute, in express terms, provides that no other evidence than the recorded minutes is admissible, parol evidence may be received when no record is kept, or the proceedings have not been recorded. See Dillon, Mun. Corp. sections 300, 301, and cases cited in the original opinion. The petition for re-hearing is **OVERRULED**.

JAMES ENNIS, JR., Appellant, v. THE FOURTH STREET BUILDING ASSOCIATION OF CLINTON, IOWA.

New Trial: UNAVOIDABLE CASUALTY. A first mortgagee was made defendant in an action to foreclose a second mortgage, and employed an attorney, who filed an answer in such case and agreed to appear and defend. Five days before suit was tried the attorney absconded without the knowledge of his client, and the case was tried without any evidence being offered, resulting in judgment foreclosing the mortgage and making the first mortgage subject thereto. *Held*, unavoidable casualty and misfortune, within Code section 8154, entitling the mortgagee to have the decree set aside.

Appeal from Clinton District Court.—HON. P. B. WOLFE, Judge.

FRIDAY, MAY 28, 1897.

On the first day of April, 1895, plaintiff filed his petition to set aside the decree rendered October 30, 1894, and for a new trial on the ground of unavoidable casualty and misfortune. Defendant demurred to the petition, which demurrer was sustained, and, the plaintiff failing to further plead, judgment was rendered against him, from which he appeals.—*Reversed*.

Hayes & Schuyler and *T. W. Hall* for appellant.

Walsh Bros. for appellee.

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102	520
127	460

102	520
127	630

102	520
140	397

GIVEN, J.—I. The petition shows that this defendant, as plaintiff, commenced an action at the September term, 1894, against Margaret and James Ennis, to foreclose a mortgage executed by them to this defendant on certain lots in the city of Clinton; that at that time this plaintiff had a valuable subsisting mortgage on said lots for two thousand dollars, executed and delivered to him by said Margaret and James Ennis, on the twentieth day of April, 1891, which was duly recorded on the tenth day of July, 1891; that on the twenty-fifth day of August, 1894, he was made a party to said action, as having some interest in or lien upon said lots which was alleged to be junior and inferior to the mortgage of this defendant; that, upon being served with notice, this plaintiff employed one Richard F. Price, a practicing attorney at law and a resident of Clinton, to prepare and attend to his defense in that case; that said attorney prepared an answer, setting up plaintiff's mortgage, and denying that defendant's mortgage was superior thereto, which answer was filed on the fifth day of September, 1894, and to which no reply was ever filed; that said attorney agreed to appear and defend said action, to keep this plaintiff advised of all proceedings therein, and to notify him when he would be needed for the purposes of the trial or any proceeding therein, and that plaintiff fully relied upon said Price as his attorney, and upon said arrangements; that about the twenty-fifth day of October, 1894, said Price, unknown to the plaintiff, absconded, and his whereabouts have not since been known; that on the thirtieth day of October, 1894, in the absence of this plaintiff and of his said attorney, without the plaintiff's knowledge, and without any evidence being offered as to which of said mortgages was prior, and without the attention of the court being called to that issue, decree was entered foreclosing this defendant's mortgage, and making

plaintiff's mortgage subject thereto; that execution was issued on said decree; and that plaintiff did not know of the absence of said Price nor of the rendering of said decree until after the execution was issued. Plaintiff alleges that he has a good defense to said action, and that he was prevented from making it "by unavoidable casualty and misfortune, as herein fully set forth." He asks that said judgment may be set aside, and for a new trial in the case as to him. There are some allegations of irregularity in rendering said decree, but not such as to require attention. The grounds of the demurrer are that the petition does not show reasonable diligence, that it shows negligence on the part of plaintiff and his attorney, and does not state facts sufficient to entitle plaintiff to the relief demanded.

II. Under section 3154 of the Code a new trial may be granted "for unavoidable casualty or misfortune preventing the party from prosecuting or defending." Casualty is defined as "inevitable accident; event not to be foreseen or guarded against." Misfortune is defined as "any instance of adverse fortune; an unlucky accident; a calamity, mishap; mischance." See Standard Dict. If the matters alleged in this petition are true, this plaintiff has not only pleaded but can maintain his defense against the right of the plaintiff in that action to priority under its mortgage. He was prevented from maintaining that defense at the trial, not because of any negligence on his part, but because, unknown to him, his attorney had absconded, and had failed to notify him or to appear in the case. Plaintiff in employing and relying on Price had done just what men usually do under such circumstances. He had done all that was necessary for him to do for the purpose of making his defense. The fault was Price's, and while it is true that a new trial will not be granted because of the negligence of the attorney, yet where that negligence may not be imputed to the party, and where it amounts to an

unavoidable casualty or misfortune that has prevented the party from defending or prosecuting, a new trial should be granted. The absconding of Price, and his failure to notify the plaintiff and to attend to the case, was an event that plaintiff had no reason to anticipate or to guard against. It was a mishap,—a mischance,—that he had no reason to expect. We recognize the discretion that is given to trial courts in granting or refusing new trials, and the rule that this court is slow to interfere with the exercise of that discretion. These rules apply with greater force to cases where an actual trial has been had than to cases like this. We think the petition shows that plaintiff was prevented from making the defense which he had pleaded to that action because of unavoidable casualty and misfortune, and that, if the facts alleged are sustained, he is entitled to the relief demanded.

Other matters are discussed that do not appear in the petition, and which are therefore not entitled to consideration. Our conclusion is that the court erred in sustaining the demurrer, and the judgment is therefore REVERSED.

C. HAMIL, Appellant, v. CARROLL COUNTY.

Counties: SHERIFF'S FEES: *Care of prisoners.* Under McClain's Code, section 5041, providing: "The sheriff is entitled to recover the following fees" (section 5056): "for boarding a prisoner, a compensation fixed by the board of supervisors, not less than fifty cents a day;" (section 5057) "for waiting on and washing for prisoners, 1 the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors;" and section 5063, providing that the sheriff is also entitled for attending courts, and for other services for which no compensation is allowed by law, to such an annual salary as may be fixed by the board of supervisors,—he is entitled, for washing for and waiting on prisoners, to a reasonable compensation outside of his salary.

Counties: SAME. Washing bedding used by prisoners, if necessary to keep the same in suitable condition for their use, is "washing for

the prisoners" within McClain's Code, section 5057, entitling the
2 sheriff to remuneration from the county for services in waiting on
and washing for prisoners; and that it was necessary will be
assumed where it is ordered by the board.

SAME. Mending the clothes of prisoners, if a necessary service for the
proper keeping of the prisoners, is waiting on them within
2 McClain's Code, section 5057, entitling a sheriff to remuneration
from the county for waiting on the prisoners.

Appeal from Carroll District Court.—HON. S. M.
ELWOOD, Judge.

THURSDAY, JANUARY 28, 1897.

THE petition shows that P. J. Hamil was sheriff of the defendant county for the years 1892 and 1893, and as such had charge of the jail and of the prisoners therein confined; that in taking care of the prisoners there was a large amount of work performed by him, consisting of washing, scrubbing, and cleaning the jail, washing and cleaning the bedsteads and bedding, mending the clothes of the prisoners and the bedding, cleaning and renovating the jail, and keeping the same in a good and healthy condition; that these things were done on account of the prisoners therein confined, and were necessary to be done to keep the jail in suitable condition; and that it was done at the verbal request of the chairman and another member of the board of supervisors, and that it was acquiesced in by said board. It is alleged that the reasonable value of the work was ten dollars per month for the two years. The petition makes specification of items, and of the prisoners for whom the services were rendered, which it is unnecessary to set out. It also appears that the account was assigned to the plaintiff, and the account presented to the board, and payment refused. To the petition there was a demurrer, which the court sustained, and from the ruling the plaintiff appealed.—*Reversed.*

George W. Bowen for appellant.

George W. Korte for appellee.

GRANGER, J.—The claim urged against the petition is that the services for which recovery is sought are not such as the law makes provisions for the payment of, except in the salary allowed by law to the sheriff. Appellant claims that the services in question are not such as the sheriff, in the capacity of sheriff, is required to perform; that they are not the services for which the fees and salary provided by law are a compensation. The sheriff is made the custodian of the jail or prison of the county, and of the prisoners in the same, and is required to receive those lawfully committed, and to keep them himself, or by his deputy or jailor, until discharged by law. McClain's Code, section 474. The sections hereafter cited will be of the same Code. The object of the section is, obviously, to require the sheriff to have charge of the jail, and receive and retain prisoners lawfully committed. It does not deal with how the duty is to be discharged. Other sections provide a fee of twenty-five cents for the commitment and discharge of each prisoner; if received on surrender of bail, fifty cents, code, section 5054, 5055. Sections 5041 and 5060 provide fees and compensation for the sheriff in particular cases. The following is a part of section 5062: "The sheriff is also entitled, for attending district and circuit courts, and for other service for which no compensation is allowed by law, such annual salary as may be fixed by the board of supervisors, and in no case less than two hundred dollars nor more than four hundred dollars." Sections 6122 and 6135 provide as follows: "It is the duty of the keeper of the jail of the county to see that the same is constantly kept in a cleanly and healthy condition, and he must pay strict

attention to the personal cleanliness of all the prisoners in his custody as far as may be. Each prisoner must be furnished daily with as much clean water as may be necessary for drink and for personal cleanliness, and with a clean towel and shirt once a week, and must be served three times each day with wholesome food, which must be well cooked, and in sufficient quantity." "All charges and expenses of safe keeping, and maintaining convicts and persons charged with public offenses and committed for examination or trial, to the county jail, shall be paid from the county treasury, the accounts therefor being first settled and allowed by the board of supervisors. * * *" It is from these provisions of the law that we are to determine the question. The holdings of this court have been uniformly against constructive fees to officers. The rulings are to the effect that the compensation to be paid to sheriffs is such only as is provided by law. This statement is all that is claimed, and it is unnecessary to review or cite the cases. The sections we have designated from McClain's Code from 5041 to 5062 are sections of chapter 94, Acts of the Nineteenth General Assembly, and the act is designed to regulate the fees of sheriffs; and, for the purposes of this case, we may say that, unless the act provides for plaintiff's claim, or some part of it, the claim cannot be sustained. It is not thought but that the services are to be compensated, but it is thought that the allowance of two hundred dollars as salary, which in all cases is to be allowed, is designed by the law to cover such services. Section 6122 of the Code, above quoted, shows that at least a part of the services rendered are such as the law requires; for instance, washing for and waiting on the prisoners. The language of the law giving to the sheriff a salary is: "The sheriff is also entitled for attending district courts, and for other service for which no compensation is allowed by law, such annual salary as may be fixed by the board of

supervisors. * * *” Now, if it does not appear that the act allows compensation for some part of these services, then they are to be paid for by the salary. Chapter 94 of Acts of the Nineteenth General Assembly provides as follows: “Section 2. The sheriff is entitled to charge and receive the following fees: * * * Sec. 17. For boarding a prisoner a compensation to be fixed by the board of supervisors, not less than fifty cents per day. Sec. 18. For waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors.” It seems to us the express language is that for waiting on and washing for prisoners the fee or compensation shall be reasonable, to be fixed by the board of supervisors. No one, we think, doubts that the sheriff is entitled to compensation for the board of prisoners, outside of the salary, and, if so, because it is “allowed by law”; and it is no more allowed by law than is the compensation for waiting on and washing for them. The law in each case in terms allows a compensation for the service, and leaves it to the board of supervisors to fix the amount. In *Grubb v. Louisa County*, 40 Iowa, 314, it was held that a sheriff was not entitled to compensation outside of fees and salary for waiting on prisoners; that the salary was presumed to be sufficient to compensate him for services for which no fees were allowed. That case involved a construction of Code of 1873, sections 3788, 3789 (not McClain’s), which sections fixed the compensation of sheriffs in part. At that time there was no such provision for compensation for waiting on and washing for prisoners. The sections were repealed by Acts Eighteenth General Assembly, chapter 115. The rule announced in that case, as well as in others, that for a service for which no fee is prescribed by law the fees and salary prescribed are presumed to be a compensation, is preserved in this opinion. It is clear to us that the petition presents a cause of action,

and that for washing for and waiting on the prisoners a reasonable compensation should be allowed. What services should be regarded as waiting on prisoners, within the meaning of the law, is a question not presented, and, of course, we do not decide it. The judgment is REVERSED.

SUPPLEMENTAL OPINION ON RE-HEARING.

FRIDAY, MAY 28, 1897.

PER CURIAM.—Appellee, in a petition for a re-hearing, concedes the correctness of the law as stated in the opinion, but, because of its claim that the averments of the petition do not include services in washing
2 for or waiting on the prisoners, it is likely proper that we should be more specific in that particular, in view of further proceedings in the district court. Some of the language used, in stating what work was done, is so general as to render uncertain the particular kind of work included, and as to such we construe it against the pleader. It does appear that the bedding used by the prisoners was washed. We understand such a service to be “washing for the prisoners,” where it is necessary to keep the bedding in suitable condition for their use. It also appears that the clothes of the prisoners were mended. If this was a necessary service for the proper keeping of prisoners,—which we assume, because done at the instance of the board of supervisors,—then it would be waiting on them, within the meaning of the law. We are not able to discover any other service which, on the face of the petition, would authorize a recovery. The petition for a re-hearing is OVERRULED.

BECKER, CLARK & STONE V. WILLIAM CALDERWOOD,
Appellant.

102 529
112 581

Sale: WARRANTY: *Action for price.* Plaintiff advised defendant, a farmer, who wished a wind-mill, to buy one made by a third party, and gave him a circular, issued by such third party, guaranteeing that it would not wreck in any storm that did not destroy the building. Defendant thereafter agreed to buy a wind-mill of that kind. When plaintiff began to set it up on defendant's farm, he gave him a circular, issued by the maker, requiring certain questions to be answered by a purchaser before a signed guaranty of the wind-mill would be issued. These questions defendant refused to answer, and also refused to accept the mill, or pay for it, unless guaranteed as stated in the first circular. *Held*, that an action for the price would not be sustained.

SAME. Plaintiffs sold machinery as their own by contract providing that the purchaser should have the maker's guaranty, and on delivering it gave the purchaser a letter from the maker accompanying it, and told him, "there is a letter with the questions you will have to answer before you can get a warranty. *Held*, that this was an attempt by plaintiff to impose on the contract new conditions, which, it will be assumed, were the only terms on which they could give the maker's guaranty.

Appeal from Scott District Court.—HON. C. M. WATERMAN, Judge.

SATURDAY, DECEMBER 12, 1896.

ACTION on a contract of sale and an account for labor performed. The following statement of facts by appellant is conceded, with a slight modification, to be correct; and, as the case presents a legal question based thereon, we give it: "Appellees, during the year 1894, were engaged in the business of drilling wells and selling and setting up windmills. Their office was in Le Claire, Iowa. Early in May, 1894, appellant, a farmer, living near Le Claire, called upon Becker, Clark & Stone, desiring to buy a windmill. Mr.

Becker recommended a mill called the 'Aermoter,' and during the conversation handed Calderwood a circular, issued by the Aermoter Company, manufacturers of the Aermoter, and stated to him that he knew this firm to be a reliable firm, that anything they guaranteed,—anything they said they would do in that circular,—they would do. Becker told Calderwood to take the circular home and read it. Among other things stated in this circular was the following: 'We guarantee the aermoter and tower not to wreck in any storm that does not destroy buildings, and we also guarantee that our eight-foot wheel is the full equal of any wooden ten-foot wheel. * * *' Mr. Calderwood took the circular home and read it, and about the middle of May, 1894, he went back to Becker's office and ordered an eight-foot aermoter and sixty-foot steel tilting tower, agreeing to pay one hundred and seven dollars for same, appellees to set up the mill on his farm, he to pay thirty cents per hour for the time consumed by appellees in setting it up. About June 1, 1895, appellees brought the aermoter and tower to appellant's farm, and began setting it up. That night Clark (one of the appellees) handed Calderwood a circular letter, which he said had come with the mill. This letter read as follows: 'To the Purchaser: If you wish to obtain a signed guaranty on this outfit, fill out this blank in full and return immediately. If the outfit is properly erected, we will forward you a guaranty under the official signature and seal of the Aermoter Company. If everything has not been properly done, we will make it our business to see that it is attended to at once. No guaranty after this date (Feby. 15, 1894) on our goods is official, which does not bear the signature and seal of the Aermoter Company. To obtain such guaranty all the information asked for below must be forwarded within thirty days after the outfit is erected. [Signed] Aermoter Co., 12th and Rockwell Sts., Chicago, Ills.' Then follows a list of questions, among

which is the following: 'Is the aermoter fifteen feet above surrounding wind obstructions within 400 feet? This question Mr. Calderwood must have answered in the negative, if at all. Next morning he said to Mr. Clark: 'I don't want that mill. I can't answer those questions, and I don't want you to put the mill up.' Mr. Calderwood then wrote to the Aermoter Company, and they answered his, in substance, that they would not give any warranty upon the mill unless it was erected fifteen feet above surrounding wind obstructions. Mr. Calderwood refused to accept the mill, or to pay for it, unless it was warranted by the manufacturers as stated in the circular hereinbefore referred to, and notified Becker, Clark & Stone to remove it from his farm, and, upon their failure so to do, he took down the mill and stored it. They sued for agreed price of mill and six dollars additional for labor in setting it up. Appellant counter-claimed, as shown in the answer and counter-claim. Upon the close of defendant's evidence, the court directed the jury to return a verdict for plaintiff, in accordance with such direction, for the amount claimed. Judgment was afterwards rendered upon said verdict, from which defendant has appealed."—*Reversed*.

Cook & Dodge for appellant.

Becker & Thuenen for appellee.

GRANGER, J. —The only modification of the statement suggested by appellees is that the agreement to erect the mill was not a part of the contract of purchase; but we think it appears from the record, without dispute, that the contract of purchase included that of erecting the mill for a compensation stated. It is to be understood that the sale was made by the plaintiff on the guaranty of the Aermoter Company. Appellees

present the question for consideration as follows: "The only question in this case is whether, at the time Calderwood attempted to rescind the contract of purchase, he was the owner of the windmill in question under such a warranty as the circular given him by Becker promised." Appellees then present their contention in these words: "Appellees contend that the statement in the circular constituted the warranty, and nothing in said circular contained could be construed to mean that the Aermoter Company would give any other kind of a warranty with its mill than such as was contained in the circular." It is said to be appellees' thought that as the Aermoter Company has issued its circular, with the terms of its warranty, and that appellant had made his contract upon the terms of the warranty in the circular, the sale became conclusive between the parties to it, regardless of whether the Aermoter Company will comply or not. In other words, that, if the company now seeks to impose new conditions, it can in no way affect appellees. It is doubtlessly true that no new conditions could be imposed after the contract was complete, which we understand to be when the mill was ordered. But is there an attempt to impose new conditions? As we understand, appellant only asked that the guaranty contained in the circular be signed or become binding on the company. But appellees contend that the circular itself was, in legal effect, a proposition to any person desiring to purchase, and that the purchase from appellees was an acceptance of the proposition of guaranty by the company, and bound it so that the contract of guaranty became complete. The mill in question was a windmill, and wind was to be the motive power. The contract of guaranty is silent as to how it was to be placed in order that it might be operated by the wind and in the way it was guaranteed to operate. It cannot properly be said that the company made its guaranty regardless of the place where the mill might be set. Let

us suppose the company, instead of plaintiffs, had made the contract with Calderwood, and given the same guaranty, with nothing said as to conditions that should surround the mill to make it accessible to the wind. It is a matter of common knowledge that there must be some degree of favorable conditions. The company would be presumed to know the conditions on which it designed to place its guaranty in this respect. A purchaser would not be so presumed. Now, if the company had come to place the mill, and found the conditions not as they should be so that it could give the guaranty, could it deny the guaranty, and still enforce the contract of sale? If not, why? Because the guaranty was a part of the contract of sale, and the denial of the guaranty is not because of a default on the part of the purchaser, but because the company, in making its contract, did not take notice or inform itself of the conditions under which it must perform, and withheld from the purchaser such conditions, so that he had no knowledge of them. A right of the company to recover under such circumstances would not be claimed. How does the case differ as to the plaintiffs? They purchased the mill on their own account, and then sold it to the defendant, using the guaranty in question, and making it a part of its contract. They stood as the company would, if it had made the sale, in the respect of placing the mill so that it might meet the test of the guaranty. The abstract discloses that there was to be a period of thirty days in which to make the test, and, if not satisfactory, the mill could be returned, and the company would pay the freight both ways. This provision is a part of the contract between these parties. If plaintiff's contention is correct, they had the right to place the mill, without regard to the conditions under which the guaranty would attach, demand and receive their pay, and leave the defendant to a remedy against the company. We think that, when the plaintiffs

assumed to use the circular containing the proposed guaranty, as to matters not expressed therein, and which were essential to its proper use, they stood as would the company itself in using it; that is, they will be presumed to have the knowledge of the company in such respects, and be subject to the same rule as to right of recovery. The misapprehension is in the thought that the defendant is seeking a change in the terms of the guaranty. He is not. His contract was for a mill on his farm to which the guaranty would apply. Plaintiffs engaged to erect the mill, and when they have so performed that the guaranty attaches, then their claim will be more tenable, for then there will be contractual relations between the company and defendant. Until that time there is no such relation. We are not referred to, nor are we able to find a case with similar facts. The judgment is REVERSED.

SUPPLEMENTAL OPINION ON RE-HEARING.

FRIDAY, MAY 28, 1897.

PER CURIAM.—In a petition for re-hearing it is urged that we have misapprehended the facts, and hence the law, of the case, in that it appears that defendant refused to accept the mill because the Aer-
2 moter Company, after the purchase, tendered the defendant “a specific written guaranty on certain conditions.” which the defendant declined to accept, and it is urged that such conditions could not affect the plaintiff. The court directed a verdict for the plaintiff, and hence we must presume all facts as true, favorable to the defendant, that had substantial support in the evidence; and, applying that rule, it appears that when plaintiff came to deliver the mill it brought a letter from the Aermoter Company containing the “conditions” referred to in the petition for re-hearing, and Mr. Clark,

of the plaintiff firm, handed it to the defendant with the statement, "There is a letter with the questions you will have to answer before you can get a warranty." The letter came with the mill to the plaintiff, and the plaintiff delivered it to the defendant as containing the conditions on which the guaranty, which was a part of the contract of sale, would attach. It was as much as to say, "The guaranty we gave you from the Aermoter Company will not attach unless you conform to the requirements of the letter." The entire dealing was with the plaintiff firm. The firm was selling its own property, and in a way to carry with it the guaranty of the Aermoter Company. It must do that on the terms that the company would permit it to be done, under its agreement with the plaintiff. The agreement between the Aermoter Company and the plaintiff as to the guaranty must be assumed to be as the plaintiff attempted to give it effect by presenting the new conditions. It is clearly a mistaken idea that there was ever a contract between the Aermoter Company and the defendant. The plaintiff had not observed the terms that would create such a contract. It is to be further said that the pleadings present no issue except that plaintiff refused to give the guaranty as it had agreed. The petition for a re-hearing is **OVERRULED**.

NANCY SUTHERLAND V. NATHANIEL SUTHERLAND, *et al.*, Appellants. 102 536
112 627

Wills: *WIDOW: Acceptance of devise.* A devise to a wife by her husband of a life estate, without an express provision that such estate shall be in lieu of dower, does not bar her of her distributive share of his estate, though she accepts the devise.

Demurrer: *WHAT CONFESSED BY.* An allegation that a devise was accepted in lieu of dower is a mere conclusion, and is not confessed by demurrer to the pleading containing it which states no facts to sustain such conclusion.

Appeal: TREATING EXHIBIT AS ATTACHED TO PLEADINGS DEMURRED TO. Where defendants, in their answer, rest their defense on the provisions of a probated will, and "make the will * * * a part 1 of this answer, and refer to the same as part of this answer," without setting out or attaching a copy, on appeal, they will not be heard to say that the will is not a part of the answer.

Appeal from Jones District Court.--HON. WILLIAM P. WOLF, Judge.

FRIDAY, MAY 28, 1897.

PLAINTIFF, widow of Donald Sutherland, asks that her share of certain real estate of which her husband died seized be set apart to her. The defendants, heirs at law of said deceased, answered that Donald Sutherland died testate; that his will was duly probated; that in it he bequeathed to plaintiff the real estate described in her petition, to have and to use during her natural life, with remainder to the defendants, in lieu of her dower or statutory rights in said land; that plaintiff has since said time, used, occupied, and enjoyed said land, and is now estopped from claiming any interest therein different or contrary to said bequest. The defendants say in their answer as follows: "Defendants make the will, and the probated record, and all the papers, records, and proceedings in the matter of the estate of Donald Sutherland, deceased, in the district court of Jones county, Iowa, a part of this answer, and refer to same as part of this answer." Defendants ask that the prayer of the petition be denied. Plaintiff demurred to the answer for the following reasons: "(1) That the facts in the defendants answer do not entitle them to the relief demanded. (2) That the facts stated in said answer, and the provisions of the will referred to therein and made a part thereof, fail to show that the plaintiff is not entitled to the relief demanded." The demurrer was sustained, and, defendants electing to stand on their answer, default was entered, and decree

rendered as prayed in the petition. Defendants appeal.
—*Affirmed.*

Welch & Welch for appellants.

F. O. Ellison for appellee.

GIVEN, J.—I. Appellants insist that, as the will is not set out in nor as an exhibit to their answer it should not be considered as a part thereof in passing upon the demurrer. As, under the admissions in their answer, the only defense they have, rests upon the provisions of the will, we do not discern why appellants desire to withhold the will from consideration. In *Wishard v. McNeil*, 78 Iowa, 48, this court said: "It is not uncommon for the pleadings to refer to and incorporate therein portions of the court files by specific averment. Such practice tends to abbreviate the record, and where confusion or other harm does not result we do not think it objectionable. The practice would be subject to control of the court in the exercise of a sound legal discretion." Appellants, as we have seen, in express terms "make the will * * * a part of this answer, and refer to the same as part of this answer." Surely, in the face of this, they should not now be heard to say that the will is not a part of their answer.

II. In *Howard v. Watson*, 76 Iowa, 230, it is said "The devise to the defendant is an estate for life, and it has been held that a widow 'may take dower, notwithstanding a devise to her in the will, unless there is an express provision in the will to the contrary, and the claim for dower be inconsistent with and will defeat some provision of the will,'"—citing *Daugherty v. Daugherty*, 69 Iowa, 677. It also said: "And in *Metteer v. Wiley*, 34 Iowa, 214, it was held that the devise of a life estate would not

bar the right of a widow to a distributive share of the real estate owned by her husband at his death.”

2 The answer shows on its face that the devise is of a life estate, and fails to show that there is an express provision in the will that that estate shall be in lieu of dower. The allegation that it was so intended is the statement of a mere conclusion and one that is not warranted by what is said as to the devise. We think that the matter stated in the answer itself does not show a defense to plaintiff's cause of action. The provisions in the will are these: “(1) It is my will that my wife, Nancy Sutherland, shall have, after my death, the possession and use of my property, real and personal, until her death. (2) After her death the remaining property, real and personal, shall be appraised, and sold and divided among our children in the following portions.” Then follow the names and portions of the children. We think it entirely clear, under the cases cited, that the demurrer was properly sustained. The judgment of the district court is therefore **AFFIRMED**.

THE ILLINOIS MALLEABLE IRON COMPANY v. J. W. REED,
et al., Appellants.

Partnership. A partnership, as against third persons, is created by an agreement whereby the parties of the first part are to furnish a specified sum in installments during the ensuing year for the purpose of manufacturing a specified number of articles of a pattern invented by the second party, and to share the profits in a certain proportion with the second party, notwithstanding a further provision that if the venture is not a success the first parties may declare the agreement of no effect and receive such part of the amount contributed as may be made out of the sale of manufactured articles.

Appeal from Ida District Court.—HON. S. M. ELWOOD,
Judge.

FRIDAY, MAY 28, 1897.

ACTION on an account. Judgment for plaintiff, and the defendants appealed.—*Affirmed*.

Chas. S. Macomber for appellants.

H. L. Hastings for appellee.

GRANGER, J.—The defendants are J. W. Reed, John T. Hallam, George M. Riddle, and A. N. Hull. The suit is against the defendants as a firm, and also individually. The controlling question in the case is whether the defendants did constitute a partnership, so that the defendants Reed, Hallum, and Riddle are liable for its debts. In February, 1893, the defendants Reed, Hallum, and Riddle, as party of the first part, and defendant Hull, as party of the second part, entered into a written agreement whereby the first party was to furnish the sum of one thousand five hundred dollars in installments, as it might be needed, during the months of March, April and May of that year, for the purpose of manufacturing and having manufactured fifty corn planters of a pattern and style invented by the second party. It was further agreed that, if the corn planters so manufactured proved a success, so as to return a reasonable profit, the first party would put in further sums for such manufacture in 1894, and thereafter as long as the business should prove practicable and profitable. The second party agreed to contribute his inventions, present and future, with the right to manufacture and sell the same, and to devote his time and attention to the manufacture of the planters, without charge for such service to the party of the first part. The contract then provides for a division of profits on a basis of sixty per cent. to the first party and forty per cent. to the second party; the profits to be what remained after paying all expenses of carrying on the business, and after deducting the contributions,

whether of money or property of the parties. After a provision as to the division of the property in case of "dissolution or winding up of said business," is the following, on which reliance is placed by appellant: "It is further understood by and between the parties hereto that whereas, the said corn planter is a new invention and untried machine, and may fail in the operation of a successful machine, and in its usefulness as a corn planter, and be impractical to manufacture; and whereas, the contribution by the party of the first part of the said sum of one thousand five hundred dollars, for the manufacturing of the said fifty corn planters aforesaid, is made for the purpose of testing the practicability and usefulness of said planters: Now, therefore, if said planters prove ineffectual as such, and fail in being practical machines, then, in such event, the party of the first part may declare the foregoing contract null and of no effect, and said party of the first part shall receive back the said sum of one thousand five hundred dollars, or so much thereof as may be made out of the sale of fifty corn planters. But, in the event said planters prove to be of effect, profitable and practical to manufacture and sell upon the market, then the said one thousand five hundred dollars shall be added to any other contributions of the party of the first part, and their sum considered contribution of the said first party." The contract has no provision as to a name in which the business was to be carried on, and it was done in the name of Hull, who was by the contract to transact the business. The articles for the payment of which the suit is brought were contracted for by Hull and received by him. When the goods were purchased, plaintiff was told for whom the purchase was made. This occurred during the period provided in the contract for testing the practicability and usefulness of the planters. It is thought that the written contract did not create a partnership. That it did, there is not, to our minds, room for doubt.

Every essential element of a contract for a partnership is included in the writing. It does not say contract, but it provides for doing a well-defined business in the manufacture and sale of planters, on the basis of one party furnishing the capital and the other the business management, with a division of profits and losses. When parties thus conduct such a business, the law makes it a partnership. It is thought that the provision as to the right to revoke if the machine did not prove practicable or profitable operated to avoid a partnership till the planter should so prove. Not so. The contract only gave the right to end the relation in that event. If it did so prove, then the relation was to continue. The legal relationship was to be the same throughout, with simply a right to end it under certain conditions. There is some complaint as to the evidence of Hull to show how the business was conducted, and as to the contract. It was entirely proper to show by parol how the business was done, and what was done, including the purchase. Hull was the agent of the firm. His testimony as to the meaning of the contract, if entirely disregarded, could not change the result. The fact of the partnership conclusively appears from the contract. There is no dispute of fact in the case.—**AFFIRMED.**

M. E. HAWORTH v. V. F. NEWELL, et al., Appellants.

Judgment: ADJUDICATION BY SEARCH WARRANT PROCEEDINGS. An adjudication by a justice of the peace in a proceeding instituted by a search warrant for the delivery of stolen property, is conclusive as to the ownership of the property against the person upon

2 whom the warrant was served and who appeared and asserted her rights before the justice and submitted the ownership of the property to his determination, although there was no prosecution for larceny and conviction thereof, essential to put in operation Code, section 4657, authorizing a court by which a conviction is had, to order the restoration of the stolen property on proof of ownership.

102	541
110	815
102	541
113	676
133	677

SAME Under the Code, the filing of an information accusing some person of larceny, is not a condition precedent to the issuing of a
4 search warrant on the ground of an alleged theft of property.

JURISDICTION OF JUSTICE OF THE PEACE. Under the Code limiting the jurisdiction of a justice of the peace to cases where the
8 amount involved does not exceed one hundred dollars, the justice may proceed, though a larger sum is involved, if less than three hundred dollars, where the parties submit themselves to the jurisdiction without objection; and consent to jurisdiction will be presumed where no objection appears

JUDGMENT ON PLEADINGS. It is error to render judgment for plain-
1-4 tiff on the pleadings where material allegations of the petition are
5 denied by answer.

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

FRIDAY, MAY 28, 1897.

ACTION at law to recover the value of a sealskin cloak taken from the plaintiff by virtue of a search warrant. The defendants appeal from an order of the district court, which sustained a motion to strike portions of an answer, from a judgment on the pleadings rendered in favor of the plaintiff, and from an order overruling a motion for a new trial.—*Reversed.*

N. B. Raymond for appellants.

T. D. Hastie for appellee.

ROBINSON, J.—The petition states that the plaintiff is the owner of a sealskin cloak which the defendant George McNutt took from her residence in Des Moines on the twenty-sixth day of October, 1893, by virtue of a search warrant; that she acquired such ownership by purchase, and was in rightful possession of the cloak, and the defendants wrongfully took it from her, and now wrongfully detain it from her, in Polk county; and that it is of the actual value of four hundred dollars.

Alleged copies of the application for a search warrant, of the warrant and a return thereon, and of the record in the case made by the justice who issued the warrant and before whom a hearing as to the ownership of the property was had, are set out in the petition. The alleged copy of the application, verified by V. F. Newell, states that a sealskin cloak of the value of one hundred dollars or more, owned by Mrs. V. F. Newell, was stolen from her in Polk county; that the affiant "suspects and verily believes that Mrs. Haworth has stolen and taken the same," and that it was then concealed in a house described, in which Mrs. Haworth was then residing with her family. A warrant to search the premises was asked. The warrant required the officers who should serve it to make immediate search of the premises described for the property, and to bring it, if found, before the court. The warrant was signed, "J. H. Maley, J. P.," and bears a return to the effect that it was served, and a sealskin coat seized under it, which was held subject to the order of the court. The return is signed by McNutt. The copy of the justice's docket shows that Mrs. Newell, claiming the property, and Mrs. Haworth, disputing his claim, appeared before the justice; that an examination lasting several days was had; that evidence was taken, and that the court found that the coat was the property of, and that it had been stolen from, Mrs. Newell, and that the officer was ordered to deliver it to her, which was done. The petition denies that the statements made in the application were true, and alleges that no information charging the plaintiff with any crime was ever filed; that she was never prosecuted for the alleged larceny of the cloak, nor for having wrongful possession of it; that the defendants have conspired, assisted, and abetted each other in taking and detaining the cloak, and that the proceedings under which it was taken and is detained are null and void. The defendants are V. F. Newell, Mrs. Newell, McNutt,

and Maley. Judgment for the possession of the cloak, or, if not returned, for its value, is demanded.

I. The Newells and McNutt joined in an answer, which contained several paragraphs, the third and fourth of which were as follows:

“Third. Further answering, these defendants allege that so much of said cloak as is now in the possession of Mrs. V. F. Newell was acquired by her under and by virtue of an order and judgment
1 of J. H. Maley, a justice of the peace in and for Polk county, Iowa, duly rendered in proceedings instituted on or about the — day of October, 1893, in the name of the state of Iowa, under chapter 50 of the Code of 1873, against the said Mrs. M. E. Haworth, as defendant; that the said Haworth appeared to said action, and pleaded thereto, and agreed to a time and place for the hearing thereof; that she resisted a motion made by the prosecution for a change of venue of said action or proceeding, and testified upon the trial, and, by her attorney, cross-examined the witnesses produced by the prosecution; that by the judgment aforesaid, Mrs. V. F. Newell was adjudged to be the lawful owner of the said cloak, and said defendant has at all times since been the owner thereof, and said judgment never having been reversed, the said Haworth is estopped by said adjudication from questioning or disputing said defendant's title in this proceeding.

“Fourth. That the proceedings aforesaid, whereby said cloak was taken from the possession of the plaintiff, were in substantial conformity with the statute in such cases provided, and, the plaintiff having, as hereinbefore alleged, submitted herself and the question of the ownership of said cloak, without objection, to the jurisdiction of said Maley, justice of the peace, she is now estopped from questioning or disputing such jurisdiction in this proceeding.”

The plaintiff filed a motion to strike these paragraphs from the answer, and alleged, as grounds therefor, that the statements contained in the paragraphs are irrelevant and immaterial; that the paragraphs were an attempt to plead an estoppel, and that the facts set forth do not constitute an estoppel; that they plead conclusions of law and matters of opinion, and do not plead any facts which are a defense to the petition. The motion was sustained, and from that ruling the defendants appeal. The paragraphs stricken out were designed to set out a complete defense to the alleged right of action of the plaintiff, and the motion was, in its nature and scope, a demurrer, and will be so treated. The petition alleges, and the first paragraph of the answer admits, that the cloak was taken by virtue of the search warrant, and that no information, other than the application and affidavits for a search warrant required by the statute, was ever filed against the plaintiff for the larceny of the cloak,

and that she has never been prosecuted for that
2 offense. We are required to determine whether the proceedings in justice's court, including its final decision as set out in the pleadings, constitute an adjudication of the ownership of the cloak, and, if they did, whether the plaintiff, by reason of her participation in those proceedings, is bound by the adjudication. A search warrant is an order to a peace officer commanding him to search for personal property, and bring it before the magistrate. It may be issued upon several grounds, of which the only one we need to consider is, that the property was stolen or embezzled, in which case it may be taken on the warrant from any place in which it is concealed, or from any person who may have possession of it. The search warrant can only be issued upon probable cause supported by affidavit, and it must be in writing, and in the name of the state. It must be served and

returned to the magistrate who issued it, within ten days after its date. If property be taken under it, a receipt therefor must be given by the officer, and a written inventory thereof must be delivered to the magistrate. It is the duty of an officer who, in executing a search warrant, shall find any stolen or embezzled property, to keep it subject to the order of the magistrate. If the grounds upon which the warrant was issued be controverted, the magistrate must proceed to take testimony in relation thereto. The testimony given by each witness must be reduced to writing, and authenticated by the magistrate. If it appear that there is no probable cause for believing the existence of the grounds upon which the warrant was issued, the magistrate must cause the property to be restored to the person from whom it was taken; but, if it was stolen or embezzled, it must be restored to the owner upon his making satisfactory proof to the magistrate of his ownership thereof, or of his right of possession thereto, on his paying the reasonable and necessary expenses incurred in preserving and keeping it. It is made the duty of the magistrate to attach together the affidavits taken before issuing the warrant, the warrant, the return, and the inventory, and return them to the next district court of the county at or before its opening on the first day of its next term. Code, sections 4629-4634, 4636, 4642, 4643, 4645-4649, 4653-4656. We have been thus explicit in referring to various provisions of the Code, in part, for the reason that it is claimed a magistrate cannot acquire jurisdiction to dispose of property alleged to have been stolen or embezzled unless there is a criminal prosecution for the larceny. That is not the law. The statute does not, as a condition precedent to the issuing a search warrant and proceedings thereunder, require the filing of an information accusing some person of the larceny. The process is undoubtedly intended to

be an aid in detecting and punishing the crime, and it may or may not be accompanied or followed by a criminal prosecution, but whether there should be such a prosecution may depend upon the facts disclosed by the proceedings under the information and search warrant. The process is also useful in many cases in discovering and restoring to its proper owner stolen or embezzled property. But such proceedings are not designed for the final adjudication of disputed questions of title to property of that character. The trial authorized is by the magistrate without a jury. The proceedings are in the name of the state, and it is not necessary that there be any other party to them, although it is no doubt true that claimants of the property may so far identify themselves with the proceedings, and present such issues, as to be bound by the adjudication. A justice of the peace has jurisdiction of search-warrant proceedings, but he has no jurisdiction to try a person accused of a public offense the punishment for which exceeds a fine of one hundred dollars or imprisonment of thirty days, and he has jurisdiction in civil cases only when the amount in controversy does not exceed one hundred dollars, unless by consent of parties, which may extend the jurisdiction to any amount not exceeding three hundred dollars. If the application for the search warrant in question is correctly set out in the petition, it stated the value of the property alleged to have been stolen to be "one hundred dollars or upwards," and therefore showed that the justice would not have jurisdiction to try the offense of stealing it, and that he would probably not have jurisdiction to try and finally determine the question of title, unless by consent of parties. But we cannot treat the alleged copies of the application and other papers and proceedings set out in the petition as true, for the reason that they are denied by the answer. The portions of the answer stricken

out are indefinite and uncertain in some particulars, but fairly show that Mrs. Haworth was a party to the proceedings in justice's court; that she asserted the rights of a party, and submitted the ownership of the cloak to the determination of the court, and that she was adjudged not to be its owner. In view of these allegations, and in the absence of anything to contradict them, we cannot presume that the justice acted without jurisdiction, nor that his judgment § went beyond the issues tried. It is true, the pleadings show that no information accusing the plaintiff of the larceny of the cloak, other than the application for the search warrant, was ever filed, and that she has not been prosecuted for the offense. Therefore it appears that section 4657 of the Code, which authorizes a court before which conviction is had to order the restoration of the property stolen, on proof of ownership, does not apply. It was competent for the claimants of the property to waive all question as to its value in excess of the amount of which the justice had jurisdiction, and to submit the matter of ownership to his final determination; and that this was what they did may fairly be presumed from the paragraphs of the answer stricken out. If that was the case, the defendants should be permitted to show the fact. We conclude, therefore, that the court erred in sustaining the motion to strike.

The appellee relies upon the case of *State v. Williams*, 61 Iowa, 517, as authorizing the action of the district court. That case involved the right of the court, against the objection of the defendant, who had been acquitted of the offense of larceny of money taken from her by search warrant, to impanel a jury, and determine the ownership of the money. This court held that the right did not exist, that the acquittal of the defendant justified the presumption that the money had not been stolen, and

that the defendant was entitled to go out of court, and be placed in the situation she was in before the money was taken, leaving any claimant of the money to pursue his remedy by an action in his own name. The case does not support the ruling of the district court in this case, and is in harmony with our conclusions.

II. After the motion to strike was sustained, and an appeal from the ruling had been taken, the Newells and McNutt applied for a continuance of the cause in the district court, pending the appeal, and the application was sustained. The plaintiff thereafter moved the court to set aside the order of continuance, which was done. She then filed a motion for judgment on the pleadings, for the purpose, as stated in the motion, of determining whether the question of ownership could be inquired into under the pleadings in this case, and whether the defendants were estopped to claim ownership under their answer. The motion also asked judgment against the defendant Maley, whose answer contained substantially the same
4 averments as those stricken from the answer of his co-defendants. The court found that the plaintiff was in the rightful possession of the cloak; that as no information charging her with the crime of larceny was ever filed, and as she was never prosecuted for that offense, the proceedings under which the defendants obtained possession of the cloak were void, and that the plaintiff was entitled to the possession of it, or to its value. Judgment was rendered in her favor according to those findings. Much of what we have said is applicable to this branch of the case, and the
5 judgment was erroneous for the reasons already shown. It is also erroneous for the reason that material allegations of the petition are denied by portions of the answer not stricken out. As a

result of our conclusions, the orders and judgment of the district court from which the appeals were taken are REVERSED.

RUTHVEN BROTHERS V. THE AMERICAN FIRE INSURANCE COMPANY, Appellant.

Insurance: PRINCIPAL AND AGENT: *Waiver of policy conditions.*

- In an action on an insurance policy requiring immediate notice of
- 1 loss, and proof within sixty days, and providing that no condition thereof should be waived unless in writing, it appeared that the
 - 2 local agent of the defendant immediately notified the general manager, who had power over agents, and to pass finally on all
 - 3 proofs of loss; that the general manager directed a special agent, appointed by himself, to adjust the loss; that the special agent,
 - 4 with the approval of his superior, placed the matter in the hands of the adjuster of another company interested in the same loss,
 - 5 who, after examination, informed plaintiffs that the loss was total and that it exceeded the insurance, and that it was not necessary
 - 6 for them to do anything further in the matter; and that plaintiff, relying on such statements, did not make proof of loss until after
 - 7 the sixty days. *Held*, that the jury was authorized to find that the formal proofs required by the policy, and the notice and affidavit required by Acts Eighteenth General Assembly, chapter 211, section 3, were waived by the general manager of defendant, and that he also waived the written indorsement required by the terms of the policy.

EVIDENCE. Letters written by agents of an insurance company are admissible in evidence in an action on the policy, where they show

- 8 the history of the negotiations between the parties, or contain admissions made in the line of their duty, by which their principal is bound.

Appeal from Palo Alto District Court.—HON. W. B. QUARTON, Judge.

SATURDAY, MAY 29, 1897.

ACTION at law on a policy of insurance. There was a trial by jury, and a verdict and judgment for the plaintiffs. The defendant appeals.—*Affirmed.*

R. W. Barger for appellant.

B. E. Kelly and *Soper, Allen & Morling* for appellees.

ROBINSON, J.—The policy in suit was issued by the defendant, and insured the plaintiffs against loss or damage by fire, to the amount of one thousand dollars, for the term of one year. The property insured was a double, frame icehouse, situate on the shore of Lost Island Lake, near Ruthven. On the fifteenth day of October, 1891, during the life of the policy, the icehouse was destroyed by fire. The loss not having been paid, this action was commenced in May, 1892. A trial was had in November of that year, which resulted in a verdict and judgment for the plaintiffs. An appeal was taken to this court, and the judgment of the district court was reversed. See *Ruthven v. Insurance Co.*, 92 Iowa, 316. After the cause was remanded to that court for further proceedings, amendments to the petition were filed, another trial was had, during which evidence not submitted at the first trial was introduced, and a verdict for the amount of the policy, with interest, was returned. The judgment was for the amount fixed by the verdict.

The policy required the assured, in case of loss, to give immediate notice of the loss, and make proof of it within sixty days after the fire. Section 3 of chapter 211 of the Acts of the Eighteenth General Assembly requires the assured, in order to maintain an action on his policy, to prove that he gave the insurer notice in writing of the loss, accompanied by an affidavit stating the facts as to how the loss occurred, and that the notice be given within sixty days from the time the loss occurred. It is admitted that the notice and proof of loss required

by the policy and by the statute were not given until after the expiration of the time stated. It is insisted by the appellees, however, that notice and proof were waived by the defendant. The policy contains the following provision: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." The question of chief importance which we are required to determine is, whether the jury was authorized to find that the requirements of the statute and policy with respect to the notice and proof were waived. It is well settled that such requirements may be waived by the insurer through its authorized agents. *O'Leary v. Insurance Co.*, 100 Iowa, 390; *Harris v. Insurance Co.*, 85 Iowa, 239; *Green v. Insurance Co.*, 84 Iowa, 135; *Hollis v. Insurance Co.*, 65 Iowa, 458; *Viele v. Insurance Co.*, 26 Iowa, 54. "Any condition of a contract of insurance may be waived by the insurance company." *King v. Insurance Co.*, 72 Iowa, 315. It is said, however, that under the provision of the policy which we have set out, a waiver, to be effectual, must be indorsed upon the

policy by an agent who has the authority to do so, and that, as a waiver was not so indorsed in this case, none can be shown. We held on the former appeal that the provision was valid, and that the evidence then submitted did not show that certain agents named had authority to waive it, but that we were not to be understood as holding that the defendant could not, through his general agents, waive the provision. We also said that it was a limitation upon the power of the defendant's local, special, and adjusting agents; but what we said upon that point was made to depend upon the evidence then before us. The evidence submitted on the last trial is radically different in important particulars. It tends to show, and authorized the jury to find, that the powers of the agents of the defendant were

2 substantially as follows: C. E. Bliven was the general manager of the western department of the defendant, and at the time of the loss had been such manager for about six years. His department included the western states in which the defendant was doing business. He had power to appoint agents of the defendant within his department, and prescribe their duties. All proofs of loss were submitted to him, all payments were made by him or under his direction, and his action in regard to loss was final, unless modified or reversed by the courts. He employed as special agent for the states of Iowa, Nebraska, and Wyoming, C. W. Miller, and gave him the authority which he exercised. That included the appointment and supervision of agents within his territory, the collection of balances, the inspection of business, and the examination and inspection of losses. Bliven did not investigate losses personally, and those which occurred in Miller's territory were referred to Miller for investigation and report. Although Bliven had the right to disapprove his reports, he never did so, and Miller was

in fact the adjuster of the defendant for Iowa and the other states in which he acted.

It appears that, when the loss occurred, Ingersoll, Howell & Co., local agents of the defendant at Des Moines, were at once informed of it, and reported it to Manager Bliven. Two days after the loss occurred, on the seventeenth day of October, 1891, he instructed Miller, at Des Moines, as follows: "Please give attention to the loss at agency, Des Moines, Iowa. Assured, Ruthven Brothers; policy, 3,505; amount, \$1,000; property, icehouse; fire, October, 1891; loss, \$1,000; remarks, please adjust. Very truly, yours, C. E. Bliven." Miller arranged with an agent of the Dubuque Fire & Marine Insurance Company to attend to the matter, and on the nineteenth wrote Bliven as follows: "I have made arrangements to go to Grand Island, Neb., to-night, and have asked Mr. Wernimont, special agent Dubuque Fire & Marine, who is on the loss with us, to look after our loss. The expense will be less than if I went. * * * Hoping that my action in this matter will be satisfactory to you, very respectfully, yours, C. W. Miller, Special Agent." On the twentieth Bliven wrote Miller as follows: "Yours of * * * 19th at hand. Des Moines, 3,505. Note you have turned the adjustment of the loss over to Sp. Agt. of the Dubuque, and your action is approved. Yours, truly, C. E. Bliven, Gen. Mgr." Wernimont visited the place of the loss, and on the twenty-fourth wrote to Miller from Ruthven as follows: "Have been here two days, and after a careful investigation of the Ruthven Bros. icehouse have the following to report: Buildings were erected during the month of February, 1890, * * * were well constructed, and for permanent purposes. Fire originated in Des Moines Ice Company's building, which was started by Mr. Teachout of your city, who is connected with said company. To avoid the expense of removing several loads of straw from the building,

he started a fire in the interior thereof to burn the same. In some manner the flames spread, consuming the building, and then spread to the building covered by our policies, which stood some thirteen feet distant. As we believe that there is no question but what Ruthven Bros. can recover damages from Mr. Teachout, as he is certainly liable for loss of said property through his carelessness, and that Ruthven Bros. can recover their insurance only after it is shown they cannot recover from the parties responsible for their loss, we want to take a little time to consider matters before we proceed any further. The loss is total. I inclose diagrams and estimates from Ruthven and Emmetsburg parties. Have not made up proof of loss, and will not for the present, as I am trying to get a settlement with the firm, with understanding that they will try and recover damages first. We will advise you as soon as we proceed further, and will try and get matters in shape inside of the sixty days allowed." October twenty-sixth Miller forwarded that report to Bliven, and in his letter transmitting it stated: "Mr. Teachout is a resident of this city, and perfectly responsible. What is your opinion in regard to his liability for the loss? The loss is more than total. The lumber and hardware in the building cost \$3,350.21, with \$2,000 insurance." On the twenty-sixth Bliven responded as follows: "I have read the letter of the special agent, herewith returned for your files, with much interest. There is no doubt of the liability of the party who set the building on fire, and have no doubt our claimants could recover of him. Whether they may elect to recover from us first, and subrogate us to the amount of their claims against the party causing their fire, or recover from him, is a doubtful question. Let the matter drift until we are obliged to take action." On the twenty-sixth day of December, 1891, Miller wrote to Bliven: "This is an

honest loss, so far as the assured is concerned; but assured has failed to make proofs within the time stated in his policy, and within the time given him under our law; but I don't presume you would want to take advantage of this point in a perfectly honest loss; but I think we should make assured commence suit against the Des Moines Ice Company, and, if he fails to collect from them, we could then pay his claim against us." On the twenty-eighth Bliven wrote to Miller as follows: "* * * No claim for loss has yet been made. Not knowing what action the special agent for the other company interested took, and as he was practically acting for us, I cannot say whether the so-called P. L. required by the policy was waived. As the matter is in his hands, we perhaps had better wait his action and advice." Other letters passed between Bliven and Miller in regard to the loss, and there was correspondence in regard to it between the plaintiffs and their representatives on one side and Bliven on the other. The testimony of Bliven and Miller was also used on the trial.

From the evidence submitted the jury was fully authorized to find, not only that Miller was the adjuster for the defendant in this state, but also that Wernimont was, for the purposes of the loss in question, the authorized adjuster of the defendant, and his acts and statements, so far as they were authorized, were the acts and statements of the defendant. He visited Ruthven, as already stated; told the plaintiffs that he was authorized to adjust the loss for both his own company and the defendant; went out to the place where the icehouse had stood; inspected bills of the plaintiffs for the construction of the house; obtained prices at the hardware stores and lumber yards, and made an estimate of the cost of the building; selected appraisers, who signed an appraisalment; and made a thorough investigation in regard to the

circumstances and extent of the loss. After he had done that, he stated to the plaintiffs that the
3 loss was total and exceeded the insurance; that it was not necessary for them to make proofs of the loss, or to do anything further in the matter; and that he would report the facts to the companies, and that the policies would be paid. He had blanks for formal proofs of loss, but stated that it was not necessary that they be executed. The plaintiffs relied upon the statements made to them by Wernimont, and did not make formal proof of loss until after the expiration of sixty days from the date of the fire. The defendant did not ask for further proof. After the expiration of the sixty days Miller visited Ruthven, but did not intimate in any manner that the loss was not an honest one. In fact, it is not now, and never has been, disputed that the plaintiffs were entitled to recover the amount of their policy, had the required notice and proofs been given within the time fixed by the statute and the policy. It is true that at one time the suggestion was made that the plaintiffs should first seek to recover the amount of their loss from the party responsible for the fire; but Bliven, in a letter written in January, 1892, states that he does not think that they could be compelled to do it, but proposed to use the failure to give timely notice and proof as a means of forcing a compromise. The admitted facts are that the defendant is endeavoring to defeat the collection of an honest loss, about which there has never been any question, on the ground that formal notice and proof, which it did not need or desire for any purpose, of facts of which it was fully advised, which it had carefully investigated, and concerning which it was fully satisfied within a week after the loss occurred, were not furnished within sixty days of that time; and to that statement should be added the fact that its adjuster had induced the

plaintiffs not to furnish the notice and proof by telling them that they were not required.

A written contract, not required to be in writing, may usually be changed by parol, although it contain a provision to the effect that it can be changed only in writing. Persons competent to make such
4 an agreement may, as a rule, abrogate it by a subsequent one entered into in any manner authorized by law. *Insurance Co. v. McCrea*, 8 Lea, 513. It is the law in some states that an instrument under seal cannot be changed by a subsequent parol agreement; but it is the general rule that contracts not under seal, and not required by law to be in writing, may be so changed. The reason for this is that a written agreement not under seal is not of a higher degree than a verbal one. *Morrison v. Insurance Co.*, 69 Tex. 353 (6 S. W. Rep. 605), 5 Am. St. Rep. 69; *Taylor v. Railroad Co.*, 99 N. C. 185 (5 S. E. Rep. 750). The use of private seals in written contracts, except the seals of corporations, is abolished in this state. Code, section 45, subd. 20; Code, section 2112. And the general rule in regard to instruments not under seal applies to the policy in suit. The defendant is a corporation, and can act only by its agents. It can become a party to a contract only through their instrumentality. The provision in question was inserted in the policy through their procurement, and it could have been changed, with the concurrence of the assured, by any duly-authorized agent. It was said in *Lamberton v. Insurance Co.*, 39 Minn. 129 (39 N. W. Rep. 76), that "a contracting party cannot so tie his own hands, so restrict his own legal capacity for future action, that he has not the power, even with the assent of the other party, to bind or obligate himself by his further action or agreement, contrary to the terms of the written contract." in *Farnum v. Insurance Co.*, 83 Cal. 246 (23

Pac. Rep. 869), it was said: "It is also well settled that an insurance company cannot so limit its capacity to contract, by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot by its agents make an oral contract or an oral waiver not forbidden by the statute of frauds." The rule thus stated finds support in the following cases: *Robinson v. Berkey*, 100 Iowa, 136; *Peterson v. Machine Co.*, 97 Iowa, 148; *Osborne v. Backer*, 81 Iowa, 378; *Renier v. Insurance Co.*, 74 Wis. 89 (42 N. W. Rep. 210); *Dick v. Insurance Co.* (Wis.) 65 N. W. Rep. 642; *Insurance Co. v. Earle*, 33 Mich. 143; *Berry v. Insurance Co.*, 132 N. Y. 49 (30 N. E. Rep. 254); *Insurance Co. v. Bowdre*, 67 Miss. 620 (7 South Rep. 596). In *Farnum v. Insurance Co.*, *supra*, it was also said that "whether or not any particular agent has the general power of the company to make an oral contract or an oral waiver of a condition, notwithstanding the provision in the policy requiring a writing, is a question of fact." In *Berry v. Insurance Co.*, *supra*, it was said of general agents, who issued the policy there in question, and who had authority to make contracts without reference to the home office, that their power to waive conditions in the policy was co-existent with that of the company itself. There is no doubt that a party to a contract may waive a stipulation or condition made in his favor. The provisions in question in this case, and the requirement that notice and proofs of loss shall be furnished within the time fixed by the policy, are for the benefit of the defendant, and could have been waived by it. *Insurance Co. v. Norton*, 96 U. S. 234.

It is the general rule that an agent has power to bind his principal by doing whatever is necessary and proper in the discharge of the duties of his agency, and that frequently includes the right to waive provisions

of a contract. *Machine Co. v. Brower*, 88 Iowa, 613; *Warder v. Robertson*, 75 Iowa, 585; *Pitsinowsky v. Beardsley*, 37 Iowa, 14. That rule has been applied frequently to agents of insurance companies empowered to adjust losses. This court held, in *Stevens v. Insurance Co.*, 69 Iowa, 662, of an agent who was
5 authorized to adjust a loss, and to do whatever might be necessary in its adjustment, that he had the power to determine whether a written notice of loss required by the policy should be given, and to waive a provision of the policy that the company should not be bound by the acts or declarations of its agents, not contained in the policy. It was also said that "the authority to waive that provision is necessarily included in the power conferred upon him with reference to the adjustment of the loss." See, also, *Brown v. Insurance Co.*, 74 Iowa, 431. In *Searle v. Insurance Co.*, 152 Mass. 263 (25 N. E. Rep. 290), it was said, of an agent, that if he could be considered the general agent of the company authorized to represent it in settling the loss there in question, "he would have had, as a necessary incident, the power to dispense with those stipulations for the benefit of the company which had reference to the mode of ascertaining the liability and limiting the right of action,"—citing *Little v. Insurance Co.*, 123 Mass. 388. See also *Insurance Co. v. Dowdall*, 159 Ill. 179 (42 N. E. Rep. 606); *Berry v. Insurance Co.*, *supra*; *Insurance Co. v. Hayden*, 90 Ky. 46 (13 S. W. Rep. 585); *Rokes v. Insurance Co.*, 51 Md. 512; 1 Beach, Ins., section 566. There can be no doubt that Bliven was authorized to waive the requirements of the policy and the statute in regard to the notice and proofs of loss, and that he could appoint agents and confer upon them the power to do the same. In the adjustment of all losses in his department he stood for and fully

represented the defendant, and had the right to waive any requirements in regard to proofs of loss which it could have waived. He had the right to indorse on the policy a waiver of such requirements, and he also had the power to waive such indorsement. *O'Leary v. Insurance Co.*, 100 Iowa, 390. The case of *O'Leary v. Insurance Co.*, 100 Iowa, 173, involved the right of the secretary and general agent of an insurance company to consent to additional insurance without indorsing the consent on the policy. That in terms required such consent to be so indorsed, and provided that no agent of the company had any authority to waive any of its conditions. We held that the secretary of the company was an agent of the company, within the meaning of its policy, and that a waiver of the provision requiring the indorsement upon it of the consent for additional insurance was not established. Our conclusion was, in substance, that the mere fact that the officer in question was the secretary, and a general agent of the company, did not show that he had the right to waive the condition of the policy specified, and that, if he possessed that right, it should have been proven, in order that what he did should be given the effect of a waiver. We did not say that the condition could not be waived by an agent. The policy considered in the case of *Kirkman v. Insurance Co.*, 90 Iowa, 457, provided that no officer, agent, or employe of the insurance company, excepting the secretary, should waive any of the conditions of the policy, and that he could do so only in writing. We held the provision valid, but refrained from determining whether it would have prevented a waiver by the president of the company. Some claim was made that an agent known as an "adjuster of losses" waived proofs of loss, but that policy differed from the one in suit, in that

it designated the officer by whom a waiver could be made, and if that power could have been delegated it did not appear that the agent had been authorized to exercise it. The policy considered in *Zimmerman v. Insurance Co.*, 77 Iowa, 686, provided that changes could be made or privileges granted only by managers of the company in Chicago, and that provision was held valid. The case of *Taylor v. Insurance Co.*, 98 Iowa, 521, involved a question of waiver, based upon the knowledge of the local recording agent, through whom the company acted in making the contract of insurance. The policy contained provisions similar to that in controversy. After the policy was issued, concurrent insurance in another company was obtained without the indorsement of written consent. We held that notice to the local agent, after the policy was issued and his duties with respect to it were at an end, did not affect the company, and that he did not have authority to waive the conditions of the policy. We said that the condition was valid, but its application in a case like this was not considered, nor did we determine that it could be waived only in writing.

There is a difference between the effect of a provision which forbids a change or waiver by any officer or agent of an insurance company and one which provides that a change or waiver can only be made by a designated officer or agent. We are not to be understood as holding that, if a policy provides that a waiver may be made only by an officer or agent designated, it can be made by none other, for it may happen that the power conferred upon an agent not so designated necessarily includes the power of waiver, and that is especially true of an agent who is authorized to adjust losses. If he investigate a loss, and agree with the assured as to its amount, the

rights of the parties are thereby determined, and further proof would be wholly useless and without effect. In this case Bliven directed Miller to "adjust" the loss in question. Miller could not give the matter his personal attention, and turned it over to Wernimont. His action in so doing was expressly approved by Bliven. To adjust an unliquidated claim is "to determine what is due; to settle; to ascertain." 1 Am. & Eng. Enc. Law (2d ed.) 641. Or, as defined in Webst. Dict., it is "to settle or bring to a satisfactory state, so that parties are agreed in the result." See, also, 1 Bouvier, Law Dict. The definitions thus given are applicable to losses arising under policies of insurance. When they are adjusted, they are ascertained and determined. Therefore, the direction to Wernimont to adjust the loss included the power to waive formal proofs. The defendant must be charged with the knowledge which he acquired while acting for it. He knew that the loss was honest and total. He knew that the plaintiffs were ready to make the required proofs, and that they failed to do so in consequence of his representations that he had all the proofs which the defendant required. He had all the proofs which he asked for, and forwarded them to the defendant. With constructive, if not actual, knowledge of all these facts, the defendant did not inform the plaintiffs that formal proofs were not waived, nor demand them. We think the jury was fully authorized to find that they were waived by Bliven, and that he also waived the written indorsement required by the terms of the policy.

II. What we have said disposes of the controlling questions in the case. The defendant complains that certain letters were introduced in evidence, especially some which were written by its agents more than sixty days after the loss occurred. We think that they were properly received, as

showing the history of the negotiations between the parties, or as containing statements in the nature of admissions or declarations of fact, made by agents in the line of their duty, which were competent evidence against their principal. *Bartlett v. Insurance Co.*, 77 Iowa, 156. Letters which did not fall within these classes were clearly without prejudice. Objections are made to portions of the charge to the jury. It may be that they were faulty in some respects, but, if so, the defects were unimportant. Complaint is made of certain special findings. They are not in conflict with the general verdict, and do not show that it was the result of an erroneous finding of fact; hence we need not determine whether they are supported by the evidence. We have given this case much careful study, but do not find that the district court committed any error prejudicial to the defendant. The verdict is fully sustained by the evidence, and the judgment is **AFFIRMED**.

JOHN THOMAS V. H. O. McDONALD, Appellant.

Fraudulent Conveyance. Where a judgment defendant transferred or mortgaged his property to his wife in consideration of a deed to his homestead, which was exempt, and retained possession of
 9 personal property mortgaged, and disposed of it without accounting, and managed his wife's business as he pleased, keeping no separate account, a finding is authorized that the mortgages and conveyances were made with intent to defraud creditors.

STATEMENTS BY VENDOR: Evidence. Statements made by a vendor of land prior to the sale and relating thereto, are admissible to
 6 establish his motive in making the sale, where it is attacked as fraudulent.

Same. A conversation by a vendor of land eight years after the sale with one of his creditors, in which he tells him that he had intended
 7 to pay him but had things fixed so that he would not, is inadmissible on the question of fraud in making the sale.

JUDGMENT. A judgment in favor of a wife against her husband
 2 obtained by collusion between them for the purpose of hindering,

102	564
110	700
102	564
113	627
102	564
121	742

8 delaying and defrauding the husband's creditors, is void as to such creditors.

SAME. A judgment dismissing an action attacking deeds to certain land executed by a husband to his wife is not conclusive as against
5 a creditor of the husband as to the validity of a mortgage on other land executed by the husband to the wife at about the same time.

Garnishment. Under Code, sections 2975 and 2988, providing that if the garnishee has any of defendant's property in his hands at the time of being served, or at any time subsequent thereto, he shall
3 be liable, the garnishee is liable for property of the judgment debtor given into her hands after notice served, and before trial and judgment on the answer.

SAME: *Fraudulent conveyance.* Evidence that plaintiff in garnishment proceedings had the homestead of the principal defendant
8 sold under execution issued on his judgment, but that no sheriff's deed was taken thereunder, is inadmissible in favor of the garnishee.

SAME. The debt due, or to become due, covered by the garnishment
1 statute is one in existence when notice of garnishment is served,
3 and not one incurred thereafter.

Judgment: FORMER ADJUDICATION. Judgment on foreclosure by a wife, of a mortgage on the homestead, executed by her husband,
4 was not an adjudication against a judgment creditor of the husband as to the validity of the indebtedness, though he filed and afterwards withdrew an answer, as his judgment gave him no lien upon the premises.

Appeal from Linn District Court.—HON. J. H. PRESTON,
Judge.

SATURDAY, MAY 29, 1897.

ON June 13, 1884, the plaintiff recovered judgment against Thomas McDonald for two thousand and twenty-eight dollars, with interest at eight per cent. per annum. On November 2, 1889, Hannah O. McDonald, wife of Thomas McDonald, was served with notice of garnishment, and answered, as garnishee, that she was not indebted to her husband. To this answer, plaintiff filed a controverting pleading; and the garnishee a reply. A full statement of the facts will be found in the opinion of this court on a former hearing,

88 Iowa, 374. Trial to jury. Verdict and judgment for plaintiff, and the garnishee appeals.—*Affirmed*.

D. E. Voris and *C. W. Kepler* for appellant.

Rickel & Crocker for appellee.

LADD, J.—The debt, due or to become due, which the garnishee is required to refrain from paying under section 2975 of the Code, must be in existence, and not incurred after the notice of garnishment, 1 *Thomas v. Gibbons*, 61 Iowa, 50, and must be such as might, in the absence of fraud, be enforced by the judgment defendant against the garnishee. *Williams v. Young*, 46 Iowa, 140; *Smith v. Clarke*, 9 Iowa, 241; *Morse v. Marshall*, 22 Iowa, 290; *Cox v. Russell*, 44 Iowa, 556; Drake, Attachm., section 541; *Teague v. Le Grand* (Ala.) 5 South. Rep. 287; *Nicrosi v. Irvine* (Ala.) 15 South. Rep. 429. The notice of garnishment was served on Hannah O. McDonald November 2, 1889, and the money sought to be charged against her in this action was received by her November 22, 1890. If, in receiving this money, a debt, only, to the judgment defendant was created, she cannot be held liable. Did the relation of debtor and creditor arise from the transaction? The judgment defendant and the garnishee are husband and wife, and occupied lot three in block four in Marion, Iowa, as a homestead from some time prior to 1877, and before the plaintiff's debt was contracted, until 1890. It was inherited by the garnishee from an uncle, and she conveyed it to her husband December 22, 1877. He in turn deeded to her some real estate, and executed to her a note of five hundred and fifty dollars, secured by mortgage on the homestead, and a note of one thousand six hundred dollars, secured by

a chattel mortgage on a large amount of personal property. In 1878 he gave another note, of one thousand dollars, secured by a second mortgage on the homestead, and that amount was indorsed on the one thousand six hundred dollar note. The garnishee obtained judgment against her husband for two thousand five hundred and seven dollars and fifty-two cents and costs on the five hundred and fifty dollar and the one thousand dollar notes, and a decree foreclosing the two mortgages, in 1888. McDonald sold the homestead in 1890, and the money sought to be held in this action was received by the garnishee from the proceeds of that sale in payment of the judgment.

As between the husband and wife, no indebted-
2 . . . ness from the latter can be predicated on these transactions. The controverting pleading, however, alleges that the notes had been paid, and that the foreclosure proceedings were begun, and the decree obtained by collusion between the parties to the action, and for the purpose of hindering, delaying, and defrauding the husband's creditors. If the husband and wife entered into such an enterprise, and the judgment was thereby obtained, and the money came into her hands as the result, then she did not become thereby indebted to her husband, as he was not in a position to question the validity of the judgment. *Shallcross v. Deats*, 43 N. J. Law, 177. She received the money, his property, ostensibly to satisfy the judgment, and the law will not permit him to recover anything she may have received in carrying out their common design to cheat his creditors. But the creditors may follow his property,—and money is property, even when in the hands of third parties,—
and insist upon its proper application to the
3 satisfaction of his debts. The identical money received was the property of the judgment defendant when the garnishee received it, unless the

alleged indebtedness and decree were valid, and she was required to retain it until the garnishment proceedings were disposed of. *Sheldon v. Root*, 28 Am. Dec. 266; *Spencer v. Blaisdell*, 17 Am. Dec. 412; *State v. Lawson*, 46 Am. Dec. 293. The statute of this state provides that notice shall require the garnishee to "retain possession of all property of the said defendant then, or thereafter, being in his custody and under his control, in order that the same may be dealt with according to law." Code, section 2975. And if it appears that the garnishee "had any of the defendant's property in his hands, either at the time of being served with the garnishee notice aforesaid or at any time subsequent thereto, he is liable to the plaintiff in case judgment is finally recovered by him." Section 2988. This language is so explicit that nothing need be added. Clearly, the garnishee is held liable to answer for property of the judgment defendant coming into her hands after the notice was served, and before the trial, or judgment on her answer.

II. The foreclosure proceedings of the garnishee against her husband, and the decree entered against plaintiff, were not an adjudication against the latter of the validity of the claimed indebtedness and the mortgages, even though he filed, and afterwards withdrew, an answer and cross-petition. The plaintiff could not have litigated such an issue in that action. The house and lot was the homestead of McDonald and his wife, and the plaintiff acquired no lien on the premises under his judgment. *Lamb v. Shays*, 14 Iowa, 567; *Cummings v. Long*, 16 Iowa, 41; *Payne v. Wilson*, 76 Iowa, 37; *Beyer v. Thoeming*, 81 Iowa, 517. Having no lien upon the property, he was not a necessary party to the foreclosure proceedings, and did not have such an interest therein as would entitle him to contest the amount of the garnishee's claim,

or the validity of her mortgages. Whether the evidence of the indebtedness was changed did not affect any existing interest he then had, and he could make no contest with reference thereto, except as a mere intermeddler, and this the law will not permit. The mere fact of his filing an answer and cross-petition, and then withdrawing it, would not affect his rights in such a case. *Finnegan v. Campbell*, 74 Iowa, 158. And these were properly excluded from the evidence, for they did not tend to establish any of the issues. That plaintiff was made a party appeared from the petition and decree, and this was all that the garnishee was entitled to show on the issue as to whether the judgment was obtained by collusion.

III. The plaintiff commenced an action in equity in 1886, to subject the land conveyed by McDonald to his wife, to the payment of his judgment. Upon hearing, a decree was entered dismissing the
5 action, and it is claimed that this was an adjudication of the validity of the mortgages on the homestead. Such an issue was not necessarily involved in that action. When the garnishee conveyed the homestead to her husband, he deeded what is called the "Carnegie House and Lot," to her, and also executed the five hundred and fifty dollar and the one thousand six hundred dollar mortgages heretofore mentioned, in the adjustment of the difference, as is claimed. The plaintiff in the action referred to, sought to subject the Carnegie property, with other land, to the payment of his judgment. Now, the one thousand six hundred dollar note and mortgage are not included in the judgment of the garnishee against her husband, but such judgment is based on the note and mortgage of one thousand dollars, executed about one year later, and in no way connected with the transfer of the property from garnishee to her husband, and the five hundred and fifty dollar note and

mortgage given in part payment of the difference in the values of the property exchanged. So that the plea of *res adjudicata* would only go to this last mortgage, and this was only incidentally involved in the suit to subject the land. It could only be considered as evidence bearing on the *bona fides* of the transfer of the land from the husband to the garnishee. No relief was asked against the homestead or this mortgage, and none could have been granted. That action attacked the deeds of land. This seeks to declare a mortgage on other land, fraudulent and paid. Although the deeds and mortgage were executed at about the same time, the motives in doing so may have been very different. The deed may have been given in good faith; and the mortgage, for the purpose of covering up property, and exaggerating the indebtedness of McDonald to his wife. An inference of validity of the mortgage may be drawn by way of argument from the result in that case, but this is not sufficient. 1 Freeman, Judgm. section 258. It doubtless came in question collaterally, and as an incident to the charge of fraud, but was not involved in the issues raised by the pleadings. Only the ultimate facts in dispute upon which the decree is predicated are adjudicated, and not mere matters of evidence. As bearing on this question, see 1 Van Fleet, Former Adj., 31; *Belden v. State*, 103 N. Y. 1 (8 N. E. Rep. 363); *Smith v. Town of Ontario*, 4 Fed. Rep. 386; *King v. Chase*, 15 N. H. 9; *Cromwell v. County of Sac*, 94 U. S. 351; *Haight v. Keokuk*, 4 Iowa, 199; *Fairfield v. McNany*, 37 Iowa, 75; *Hahn v. Miller*, 68 Iowa, 745; *Lindley v. Snell*, 80 Iowa, 103.

IV. The intent of the vendor is in issue when the conveyance is attacked on the ground of fraud, and his statements made prior to the transaction, and relating thereto, are admissible to establish his motive. *Moss & Co. v. Dearing*, 45 Iowa, 530; *Craig v. Fowler*,

59 Iowa, 200; *Bener v. Edgington*, 76 Iowa, 105; *Guidry v. Grivot*, 14 Am. Dec. 192; *Horton v. Smith*, 42

6 Am. Dec. 628; *Murphy v. Mulgrew* (Cal.) 36 Pac.

Rep. 857. Such evidence, when the declarations are made in the absence of the vendee, cannot be considered, as against the latter, in determining whether there was participation on his part; and the court should always, as in this case, guard the consideration to be given by the jury to evidence of this character, by proper instructions. *Benson v. Lundy*, 52 Iowa, 265, when examined, will be found in harmony with these views, as in that case Lundy, the mortgagor, was found to have a fraudulent intent, and the court was only required to say whether his declarations were admissible to prove participation therein by the mortgagee, Hardin & Sons. Hoagland's testimony detailed a conversation with McDonald in which the latter disclosed his plan for defeating the indebtedness to plaintiff, and other claims. This conversation took place a few days before the transfers of the property, and was clearly admissible. The declarations of the vendor, made after the transaction, and not connected therewith, and when he is not in possession, are only those of a stranger, and cannot be received in evidence. *Benson v. Lundy*, *supra*; *Bixby v. Carskaddon*, 70 Iowa, 726; *Turner v. Hardin*, 80 Iowa,

691. The plaintiff testified that he had a conversation with McDonald about eight years after the
7 transaction, in which the latter said that he had intended to pay him, but that he had things fixed so that he would not. On what theory this evidence was admitted, does not appear. It is not connected in any way with any transaction, and certainly could not have prejudiced the garnishee. It was very evident, without any additional proof, that McDonald had succeeded in

avoiding payment of the debt for over thirteen years, although the plaintiff had manifested much zeal in trying to secure it.

V. Execution was issued on plaintiff's judgment, and the homestead sold thereunder, but no sheriff's deed taken, and garnishee offered so to show at the trial. No right or interest was acquired under

8 the sale. What bearing the evidence offered would have on the issue in this case, appellant has failed to explain, and we are unable to discover. Certainly going through the idle form of selling property on which plaintiff had no lien, and to which he could acquire no title, did not affect the validity of the balance due on his judgment, or the right to enforce it against the property of the defendant.

VI. The verdict has such support in the evidence as will prevent any interference. The judgment defendant transferred or mortgaged all his property to

9 his wife in consideration of a deed to the homestead, which was exempt from the payments of his debts. After having mortgaged the personal property, he retained and disposed of it without making any account thereof to the mortgagee. He managed his wife's business entirely, collected money claimed to belong to her, and used it as he pleased. No separate accounts were kept, but large amounts were applied on her indebtedness. That he had a fraudulent design in transferring his property to her, does not admit of doubt, and, whether she participated therein or not, the facts were sufficient to put her on inquiry. If the jury found the mortgages were fraudulent or paid,—and there was evidence tending to so show,—then this, with the fact that proceedings were begun by the garnishee against her husband by reason of directions so to do through him, may well sustain the finding that the judgment was obtained by collusion between husband and wife. Indeed, as to plaintiff,

it amounted to only a change in the evidence of the alleged indebtedness, concerning which he was not and could not be heard. The litigation between these parties has been long continued, and, from a careful examination of the record in the case, we are convinced the result is just. The judgment must be **AFFIRMED.**

MARSHALL COUNTY, Appellant, v. JOHN KNOLL, *et al*

Mulct Law: RECOVERY ON BOND. The sureties on a bond given by a

- 1 liquor dealer under Acts Twenty-fifth General Assembly, chapter 62, section 17, conditioned on the faithful observance by the principal of all the provisions of such act, are liable for the tax imposed by section 11, where the principal fails to pay the same.

TAX: Personal liability. The tax imposed by the mulct law (Laws 1894, chapter 62, section 11) on liquor dealers, which it provides

- 3 "shall be assessed against every person, partnership or corporation" engaged in the business, creates a personal liability on the part of the debtor, which may be enforced by an ordinary action, notwithstanding the lien also given therefore on the real estate wherein the liquors are sold, and on all personal property used in connection with the business.

SAME. Whether an ordinary tax may be collected by an ordinary 3-4 action, is left undecided,—*City v. Railway Co.*, 89 Iowa, 80, and 7 *City v. Railway Co.*, 41 Iowa, 189, analyzed.

Demurrer: OBJECTION BELOW. An objection, that the petition in an

- 1 action on a bond to recover the amount of a tax levied on account of the sale of intoxicating liquors does not show that the tax cannot be collected from the personal property used in the business,
- 5 or that the liquor dealer giving the bonds is insolvent, should be presented by demurrer. (See chapter 96, Twenty-fifth General Assembly.)

Appeal: NOTICE ON DEFENDANT: Mulct law bond. Under Code, 2550, providing that where two or more persons are bound by contract, including the parties to negotiable paper and sureties on the same or separate instruments, the action may, at plaintiff's option be brought against any or all of them, and section 2551, 2 providing that the court may determine any controversy between the parties before it, where it can be done without prejudice to the rights of others, an appeal by plaintiff in an action on a liquor bond will not be dismissed because notice of appeal was not served

102	573
110	356
102	573
112	808
102	573
114	849
102	573
116	44
102	573
126	544
102	573
127	126
127	231
102	573
137	735

on the principal in the bond although he was named as defendant, where he was not an actual party to the proceedings in the trial court.

Appeal from Marshall District Court.—HON. B. P. BIRDSALL, Judge.

MONDAY, FEBRUARY 1, 1897.

ACTION at law on a bond to recover the amount of a tax levied on account of the sale of intoxicating liquors. Demurrers to the petition were sustained, and, the plaintiff refusing to plead further, judgment was rendered in favor of the defendants for costs. The plaintiff appeals.—*Reversed.*

T. Brown for appellant.

Anthony C. Daly and *Theo. F. Bradford* for appellee Knoll.

J. L. Carney for appellee Parsons.

ROBINSON, J.—The petition filed by the plaintiff names N. J. Akers, John F. Knoll, and O. J. Parsons as defendants, and states that they executed to the state of Iowa, and to Marshall county, of the
1 state of Iowa, their penal bond, in the sum of three thousand dollars; that it was given under the provisions of chapter 62 of the Acts of the Twenty-fifth General Assembly, entitled "An act to tax the traffic in intoxicating liquors and to regulate and control the same;" that by virtue of that act the defendant Akers obtained a license and opened a saloon in a building situate on a lot in Marshalltown, which is described; that in June, 1894, the proper assessors assessed Akers for taxation, and returned the assessment to the county auditor; that on the second day of July, 1894, the board of supervisors of Marshall county

duly levied a tax of three hundred dollars for the time commencing on the twenty-eighth day of May and ending the first day of October, 1894, which stands against Akers, and which all the defendants are owing, under the bond, together with twenty per cent. penalty and interest, and accruing penalties and costs. The petition further alleges that the tax cannot be enforced on the real estate in which the saloon was kept by Akers, for the reason that it was mortgaged for its full value before the act referred to was passed, and the mortgagee had no knowledge that sales of liquor were made on the mortgaged premises, and that the defendants have failed to comply with the conditions of the bond in failing to pay the tax specified. Judgment for the sum of five hundred dollars is demanded. Knoll and Parsons filed separate demurrers to the petition.

I. Akers was not served with notice of the action, and did not appear in it, nor was the notice of appeal served upon him. Knoll and Parsons have filed a motion to dismiss the appeal on the ground that this court has no jurisdiction of the cause, for the reason that notice of appeal was not served upon Akers.

2 He was primarily liable on the bond, and his liability was not affected nor his rights prejudiced by the proceedings against his sureties. Section 2550 of the Code provides that, "where two or more persons are bound by contract, * * * whether jointly or severally, or severally only, and including the parties to negotiable paper, common orders, or checks, and sureties on the same, or separate instruments, or by any liability growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them." The next section provides that "the court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their

rights." Under these provisions an action may be brought against a surety alone, and, when he is joined with his principal, judgment may be rendered against him before it is against his principal. *Okey v. Sigler*, 82 Iowa, 98. The fact that Akers was the principal on the bond in suit, and that he was named as a defendant, did not make him one in fact, nor prevent the prosecution of the case against the sureties who were named as co-defendants. Since Akers was not an actual nor a necessary party to the proceedings in the district court, it was not necessary to serve notice of appeal upon him in order to give this court jurisdiction of the case. It was held in *Fisher v. Chaffee*, 96 Iowa, 15, that one of two sureties against whom a judgment had been rendered could not appeal from the judgment without serving his co-surety with the notice of appeal; but the reason for the holding was that the judgment appealed from could not be reversed or modified without affecting the rights of the co-surety. In that connection it was said of the principal, against whom judgment was also rendered, that he would not be affected by the result of the appeal because he was primarily liable in any event. We conclude that an appeal has been duly taken in this case, and the motion to dismiss is overruled.

II. The condition of the bond in suit is that, "if said N. J. Akers shall faithfully observe all the provisions of the Act of the Twenty-fifth General Assembly of Iowa, entitled 'An act to tax the traffic in intoxicating liquors and to regulate and control the same,' and shall pay any and all damages that shall result from the sale of intoxicating liquors upon the premises occupied by said N. J. Akers, then this
3 bond to be void; otherwise to be and remain in full force and effect." This complied substantially with the second sub-division of section 17 of

the act referred to, which required the bond to be "conditioned upon the faithful observance of all the provisions of this act, and for the payment of any and all damages that may result from the sale of intoxicating liquors upon the premises occupied by the obligor." It is contended by the appellees that the bond required by the statute is not designed to secure the payment of the tax, and that its collection should be enforced, if necessary, by a sale of the real and personal property used by Akers in the business in which the bond was given. It is the general rule that a tax is not a debt, within the common meaning of that term so that the ordinary remedies for the collection of debts may be applied to it, and that, where a special remedy for the collection of a tax is provided by statute, and no other is given or can be regarded as permitted by it, the special remedy is exclusive. *Cooley, Tax'n*, 15, 435; 25 Am. & Eng. Enc. Law, 312. But that rule does not apply in this state, where the property owner is personally liable for the tax. In *Shaw v. Orr*, 30 Iowa, 360, it was said that the vendor of real property transferred before the tax became a lien thereon, as between himself and the vendee, was not released from liability for the payment of the tax. In *City of Dubuque v. Illinois Cent. R'y Co.*, 39 Iowa, 60, it was held that a tax assessed against a property owner on account of real estate "created a debt, in the sense of the term when applied to a liability for the payment of money," and that payment of such a tax might be enforced by an ordinary action. It is true the last point was not directly involved in the case, but it was carefully considered and decided, because it was involved in other cases, and had been elaborately discussed in argument by counsel

4 concerned in those cases. See, also, 2 Dillon, on Mun. Corp., section 653. Section 1 of the act under consideration provides that "there shall be

assessed against every person, partnership, or corporation, other than registered pharmacists holding permits, engaged in selling or keeping with intent to sell, any intoxicating liquors, and upon any real property and the owner thereof within or wherein intoxicating liquors are sold, or kept with intent to sell in this state, a tax of six hundred dollars per annum. All such taxes shall be a perpetual lien upon all property, both personal and real, used in or connected with the business." Section 9 directs the board of supervisors, at their regular meeting in September, to levy the tax "against each person carrying on or conducting a place for the sale of intoxicating liquors and also against the real property and the owner thereof in which or upon which said place is located." Section 11 provides for semi-annual payments, and for a penalty of twenty per cent. on installments not paid, and also one per cent. per month until paid. The assessment is to be against the person engaged in the contemplated business, as well as upon the real property used to carry it on. Section 12 provides for the sale of real property on which the taxes assessed have become a lien, and section 13 is as follows: "All the provisions of law now or hereafter in force for the assessment, levy and collection of taxes shall apply to and govern the taxes provided for by this act, except as herein otherwise provided." The act makes the person engaged in the business to which it refers personally liable for the payment of the tax, and, in addition, provides for a lien upon and sale of the property used in the business for the same purpose. In *Smith v. Skow*, 97 Iowa, 640, it was said that what the statute calls a "tax" is not in fact a tax, within the ordinary meaning of that word, but "in reality a charge or license exacted for the privilege of carrying on the business. * * *

" We conclude that the tax is a charge or debt, which may be recovered

in an ordinary action. The theory of the demurrers was that the sureties on such a bond as that in suit are not liable for the payment of the tax, and, in addition, the demurrer of Parsons denies the liability of the sureties until the real property subject to the tax is exhausted. The petition shows that the real property is subject to a mortgage for its full value, which is superior to the tax, and that nothing can be collected from that property. *Smith v. Skow, supra.* It

5 is objected that the petition does not show that the tax cannot be collected from the personal property used in the business, nor that Akers is insolvent. It is sufficient to say, in response to that objection, that it was not presented by either demurrer.

III. The only question remaining for our determination is, does the bond in suit secure the payment of the tax and penalties in controversy? It may be conceded that the "damages" referred to in the
6 statute and in the bond, do not include the tax, but merely injuries which result from the sale of intoxicating liquors upon the premises which were occupied by Akers, for the purposes of his business; but we are of the opinion that the condition of the bond that Akers "shall faithfully observe all the provisions of" the act under consideration, made the sureties on the bond liable for his failure to pay the tax. Section 11 of the act provides, that "it shall be the duty of every person against whom or against whose property taxes as provided in this act have been assessed, to attend at the treasurer's office and pay the same in semi-annual installments, on or before the first day of April and October of each year." That Akers did not do. It is insisted that the requirement of the bond that Akers "faithfully observe all the provisions of the acts" did not require him to pay the tax, but we do not think the claim is well founded. That condition of the bond

was inserted by authority of the statute, which requires that the bond be "conditioned upon the faithful observance" of all the provisions of the act. Among the definitions of the word "observe" are the following: "To take notice of by appropriate conduct; to conform one's action or practice to; to keep; to heed; to obey; to comply with." The word was used in the statute to require the person who engaged in the business contemplated by it, to obey it, and comply with all its provisions, including the payment of the tax. It follows, from what we have said, that the district court erred in sustaining each of the demurrers, and its judgment is REVERSED.

SUPPLEMENTAL OPINION ON RE-HEARING.

SATURDAY, MAY 29, 1897.

PER CURIAM.—In the original opinion in this case we assumed that it was held in *City of Dubuque v. Illinois Cent. R. Co.*, 39 Iowa, 60, that the payment of a property tax might be enforced by an ordinary action. A further examination of that case shows that, although the opinion of the majority purports to hold as stated, the dissenting opinions indicate that the holding was in fact merely the opinion of two of the four judges, who then constituted this court, and is not, therefore of any force as a precedent. In *City of Burlington v. Burlington & M. R. Co.*, 41 Iowa, 139, the right to enforce the payment of an ordinary tax by an action at law was again referred to, but not decided; and our attention has not been called to any other case decided by this court in which the matter

7 has been considered. We do not find it necessary to decide what rule is applicable in this state to such cases, and prefer to postpone a decision of the question until it is more fully presented in

argument. The provisions of the statute under which the bond in suit was given are sufficient to authorize a recovery thereon for the tax in controversy, notwithstanding the fact that other means for its collection are also provided. We are not to be regarded as holding that an ordinary property tax may be recovered by an action at law, and, so far as our original opinion in this case could have been construed as authority for that rule, it is modified, and the question in regard to the right to maintain such an action is left UNDETERMINED.

RHODA A. GEIGER V. A. C. PAYNE, Appellant.

Breach of Promise and Seduction: PLEADING. In an action on breach of promise to marry, allegations of seduction by means of such
2 promise may be pleaded merely in aggravation of damages, and do not subject the complaint to the charge of embracing two causes of action.

DAMAGES. A verdict for sixteen thousand dollars for plaintiff in an action for breach of promise to marry, is not excessive where
9 defendant is shown to be worth from fifty thousand to seventy-five thousand dollars, and the evidence tends to show that plaintiff, relying upon such promise, allowed him to seduce her.

SAME. An instruction that the jury on the trial of an action for breach of promise to marry might consider, in estimating plaintiff's damages, the money value of the advantages of a home and
8 domestic establishment of a kind suitable to the wife of a person of defendant's situation in life, is not erroneous where defendant is shown to be worth from fifty to seventy-five thousand dollars.

SAME. Letters couched in affectionate terms, written by defendant, to plaintiff in an action for breach of promise to marry, telling her about his business affairs and explaining his relations with
5 another woman, are admissible where defendant denies the promise, and may be considered by the jury as bearing upon the purpose with which such statements are made.

Appeal: EXCUSING JUROR. Excusing a juror on a challenge for cause is not error where the juror's daughter had married a relative of one of the parties, and the juror had talked with such son-in-law about the case, particularly where no prejudice therefrom is shown to have resulted to the complaining party.

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WAIVER OF OBJECTION. A party will not be heard to complain on appeal of the admission of evidence over his objection on the trial, where after its admission he opposed a motion to have it stricken out, and the jury instructed to disregard it.

MISCONDUCT OF COUNSEL. A judgment will not be reversed because of counsel's denunciation of defendant's conduct and character. in his argument to the jury, if the proof tends to sustain, though it may not actually establish the truth of the charges so made. It is not intended by this to justify personal abuse by counsel, but to hold that in this case, upon consideration of the whole record, there was no abuse for the sake of abuse, and that the discretion of the court in its control of argument by counsel was not abused.

WAIVER BY PLEADING OVER. Where a pleading is amended so as to make it good against a sustained demurrer and issue is joined on the amendment, error in sustaining the demurrer is waived. (See chapter 96, Acts Twenty-fifth General Assembly).

ADMISSIONS OF DEFENDANT. In an action for breach of promise to marry, defendant's statements to a third person that he was between two fires, and did not know whether to marry plaintiff or another woman, was admissible to show that he had a marriage with plaintiff under consideration, though made after the alleged breach of promise.

Continuances. Refusal of continuance on account of the death of defendant's chief attorney was proper, where the cause had been several times continued at defendant's instance and the illness of the attorney, and had existed for such a period, that his presence at the trial ought not to have been expected.

Appeal from Ringgold District Court.—HON. H. M. TOWNER, Judge.

FRIDAY, DECEMBER 11, 1896.

ACTION for breach of promise to marry. Verdict and judgment for plaintiff, and the defendant appealed.—*Affirmed.*

McIntire Bros. & Jamison and Reynara Bros. for appellant.

Henry & Spence, E. W. Curry, and A. B. Cummins for appellee.

GRANGER, J.—I. To the petition there was a substituted answer in five divisions. A demurrer was filed to all except the first division, and sustained as to the third, fourth, and fifth divisions, and the parties are in dispute as to whether it was sustained as to the second division; and, as we view the record, it is not important that we settle the dispute. That there is danger of misapprehension from the record is true, for there are no less than seven abstracts filed, and in some respects they obscure, rather than make clear, disputed questions. Error is assigned on the ruling of the court in sustaining a demurrer to the answer, and

1 counsel are in contention as to what can be considered under the assignment. After the ruling on the demurrer to the substituted answer, as above stated, which was on April 26, 1895, it appears that, on the same day, defendant filed an amendment to the fourth and fifth divisions of his substituted answer, and immediately following the amendment, in the abstract of appellant, is the following: "And, on the — day of April, the court, being fully advised in the premises, sustains the plaintiff's demurrer to defendant's substituted answer as amended, to which ruling the defendant at the time duly excepted." It next appears that on the first day of May, 1895, the defendant amended the fourth division of his substituted answer, and the first division of his amendment to the substituted answer, by stating that the matters and things therein set up are pleaded in mitigation of damages. To the answer, a reply was filed, and the pleadings thus made seem to have presented the issues of fact afterwards tried.

The questions argued on demurrer are as to the rulings on the demurrer to the substituted answer. The demurrer to the "substituted answer as amended" is not set out, and it seems to have been to the entire

answer, from the language of the abstract; and it was sustained. Of course, we cannot consider it, for we do not know what it is, and no question seems to be presented as to it. The ruling held the entire answer insufficient. The amendment following made good the first and fourth divisions of it, to which there is a reply. Such a state of the record waives, or renders it unnecessary to pass on, the ruling of the court on the demurrer to the substituted answer. The substituted answer, with the amendment thereto, supplanted, for the purpose of forming issues, the original substitute, as it was assailed by demurrer; and the last ruling on demurrer became the conclusive one on the sufficiency of the answer. Some phases of the argument lead us to think that neither party takes our view of the effect of the record. The condition of the record, as we have stated it, is taken from the abstracts of both parties; and, if we are right as to the record, we think there is little doubt of the correctness of our conclusion.

II. The petition, in addition to the averments as to a promise of marriage, and a breach thereof, shows the fact of sexual intercourse between the parties, and it is averred "that said seduction and sexual intercourse was brought about and accomplished by said defendant under and by virtue of said contract of marriage. The plaintiff, relying upon said contract of marriage as herein set out, yielded up her virtue to said defendant, and was, on account thereof, 2 seduced by him." Defendant moved the court to require the plaintiff to separate the causes of action into counts, so as to present separate claims for the breach of promise, and for the seduction, which the court refused. It is plaintiff's claim that only a cause of action for breach of promise is pleaded, and that the fact as to seduction is only in aggravation of damages, and this is the view taken by the district

court in its ruling and instructions. Appellant contends that, although the fact of seduction may be used for the purpose of corroboration in a case for breach of promise, it cannot be used to aggravate the damage. The authorities are not in entire harmony on the subject, but they largely preponderate in favor of the court's ruling. Mr. Hale, in his late work on Damages, in the chapter on "Breach of Marriage Promise," says: "In estimating the damages, the jury may take into account the fact that plaintiff had been seduced by defendant, as tending to increase the mortification and distress suffered by her. If by reason of an imprudent and criminal act, in which both participated, she is brought to such a state that the suffering occasioned to her feelings and affections must necessarily be increased by his abandonment, then that would be but an inadequate and poor compensation which did not take it into account. The seduction must have been accomplished by means of the promise of marriage." The text is supported by numerous authorities. It will be seen that the allegations of the petition, as we have quoted them, show that the seduction was accomplished relying on the promise of marriage. In *Bennett v. Beam* (Mich.) 4 N. W. Rep. 8, is the following language: "That the act of seduction under a promise of marriage should go a great ways with the jury in estimating the damages ought to be true, both in law and fact. In many cases, loss sustained from a breach of the agreement to marry may be but slight, indeed, but never can this be the case where the lifelong blight which seduction entails enters into the case. Respectable society inflicts upon the unfortunate female a severe punishment for her too confiding indiscretion; and which the marriage would largely, if not wholly, have relieved her from. The fact of seduction should, therefore, go a great ways in fixing the

damages, as in no other way could amends be made the plaintiff for the injury she sustained, or the defendant be properly punished for his aggregated offenses. It would seem also to be in full accord with the sense of justice implanted in the heart of every high-minded person, and therefore within the reason of the common law." The case cites *Sheahan v. Barry*, 27 Mich. 117. See, also, *Bird v. Thompson* (Mo. Sup.) 9 S. W. Rep. 788; *Daggett v. Wallace* (Tex. Sup.) 13 S. W. Rep. 49; *Tyler v. Salley* (Me.) 19 Atl. Rep. 107; *Osmun v. Winters* (Or.) 35 Pac. Rep. 250. In 2 Am. & Eng. Enc. Law, under the proper subject, it is said: "In aggravation of damages, it may be proved in some states, if it is alleged in the complaint, that, by means of his promise, the defendant seduced her." Some twelve states are cited as sustaining the rule. It is also stated in the text that "in other states, on the ground that the plaintiff must have been a *particeps criminis* to the seduction, and therefore could not complain of it, the jury cannot consider it." Three states are cited as sustaining this rule. Both upon reason and authority, we concur in the rule of permitting such a fact to be shown in aggravation of the damage.

III. The cause was tried at the April term, 1895, at which term a motion for a continuance filed by defendant was overruled, of which ruling complaint is made. The grounds of the motions are, that
3 but a short time before the term, about a week, one M. A. Campbell, who had been the attorney for defendant for many years, and who had almost the exclusive management of this case, died, leaving the responsibility to associate counsel. A counter-showing makes it appear that the cause had been some three times continued at the instance of defendant, and that the sickness of Mr. Campbell had been of such a nature, and had existed for such a time,

that reliance should not have been placed on his ability to be able to take charge of the trial at the April term. It is clearly a case in which there was no abuse of discretion. In fact, we think it was judiciously exercised.

IV. One John N. Brown was a member of the regular panel of jurors, and was excused for cause, on a challenge by plaintiff, and error is assigned on the ruling. The most direct claim of prejudice
4 because of the exclusion of this juror is, that it necessitated calling a juror from the bystanders to complete the trial panel; but there is nothing to show that the juror so called was not acceptable and a good juror for the purposes of the trial. The examination showed that a daughter of the excused juror had married a relative of the defendant, and that the juror and the son-in-law had talked about the case, and, upon the whole, the court concluded to excuse him, and we think it not an unfair exercise of discretion. Even if it would not have been error to overrule the challenge, still we should not interfere, in the absence of a showing of prejudice. *Sprague v. Atlee*, 81 Iowa, 1.

V. It appears that defendant was a widower, residing at Mt. Ayr, in this state, and that the plaintiff was a lady some twenty-eight years of age, who came to Mt. Ayr from Newark, Ohio, and had resided there since early in 1892. The last of February, 1893, she returned to Newark, Ohio. Before leaving Mt. Ayr, she met with the defendant, and a correspondence was talked of, and afterwards had; and the letters from the defendant are, in part, in evidence. The correspondence resulted in the parties meeting at Chicago, at the world's fair, and later, in June, 1893, defendant visited plaintiff at her home, in Ohio. It is plaintiff's claim that the marriage was talked of in Chicago, and the agreement fully completed when the defendant visited her in Ohio; and it is her further

claim that her seduction was accomplished during his visit in Ohio, and because of the contract of marriage. Defendant insists that there was no agreement to marry, and on the trial he sought to make it appear that the plaintiff was highly educated, a music teacher, accomplished, and an adventurer. It is also claimed that while defendant is shrewd in the arts of money making, and has succeeded in that respect, he is uneducated, a very ordinary man in other ways, and was just the man for such a woman to influence. The letters in evidence are couched in very affectionate language. In the letters are references to a Miss Beal, at whose rooms defendant met plaintiff, and the references are in the way of statements or explanations of matters between defendant and Miss Beal. In the letters are statements as to his business, such as that "the banks are closed, and all business men come to me, and the farmers of Ringgold county have to pay for the whistle." It is also stated that he made "two hundred dollars yesterday." It is thought that permitting such parts of the letters to go to the jury was error, but we think not. It was proper for the jury to consider the reason for writing to the plaintiff, telling her about Miss Beal and about his business. Taking the general tenor of the letters in connection with the parts as to which complaint is made, and one cannot be in doubt as to the purpose of the statements thought to be immaterial. We think the letters, entire, were properly in evidence.

VI. One Bevis was a witness for plaintiff, and testified as to his having conversed with defendant about plaintiff, and his intentions as to marrying her. He was asked if he had any conversation with defendant with reference to Miss Beal, and which of the two he ought to marry. Under objection, he was permitted to answer, and the ruling is thought to be erroneous. The answer shows the materiality of the

evidence. It discloses that defendant said he was "between two fires"; that plaintiff would make him a better wife; but that he was not yet ready to get married, as his wife had only been dead a short time. Such testimony was admissible on the question of the promise to marry plaintiff. Of course, it does not show a promise, but it shows that he had the subject under consideration. Other witnesses were permitted to detail what defendant had said about plaintiff, and his purposes toward her. It appears that he told one man that he would marry plaintiff if he knew that he (the person addressed) had not had intercourse with her. To another he said he was going to make a second visit to Ohio, to see whether the plaintiff "had been tampered with;" and he accused the witness so testifying of having been too familiar with her. It was

6 not error to admit such testimony. It was proper to be considered in connection with his letters to and visits and conduct with plaintiff on the question of a marriage engagement. These conversations and statements were after the time, it is said, the engagement was made. It is said by defendant that they were after the breach, if there was one, and that is a reason urged against the admissibility of the testimony. The testimony is none the less competent or material if the statements were made after the breach than if made before. There might be a difference in their value as evidence, but they are admissions or declarations of a party, and were properly put in evidence for what they are worth.

VII. It seems that a suit was commenced on this same cause of action, and dismissed at the October term, 1894, and this suit was commenced the same day. In the other case, defendant filed, under oath, an application for continuance, reciting therein what he expected to prove by witnesses residing in Ohio, then unknown to him; the facts therein stated being

strongly against the reputation and character of the plaintiff. On the trial, the motion was offered by plaintiff, and admitted in evidence against objections, and it is said that the court erred in its ruling.

7 Later in the trial, the plaintiff's counsel moved for leave to withdraw the motion as evidence, and not have it considered by the jury; and the court sustained the motion, under objections from defendant. In making the objection to the withdrawal, it is said that, having read the motion to the jury, and getting the effect of the evidence, they could not withdraw it. It is true, the motion was before the jury; and if it be conceded that its effect, as evidence, could not well be avoided, still the query remains: What was the object of the objection to a withdrawal of the evidence, and an effort to defeat its effect? The withdrawal could not certainly make it worse for the defendant. If it was withdrawn, defendant would then be in a position to take advantage of a record showing the admission and the withdrawal, while now he is in a position of asking that evidence, which he claims to be improper, shall remain for the consideration of the jury, rather than to have an order forbidding its consideration. Undoubtedly, the thought was that prejudicial error would more clearly appear without than with the withdrawal. We think that when a party, for any purpose, desires in the record evidence that he thinks improper, rather than have it stricken from the record, he is not in a position to complain because of its admission.

VIII. There are complaints as to the instructions given. Some of them are disposed of by our holding as to the seduction being properly pleaded in aggravation of damages in the action for a breach of promise. The following is the fifth instruction: "As to the third essential, to-wit, the damages, you are instructed: If you find the contract as stated, and the defendant's

breach and refusal to perform, the plaintiff is entitled to damages, unless defendant justifies as hereinafter stated, to be measured by the following considerations: In determining what sums of money would reasonably indemnify and compensate the plaintiff, the jury may consider the disappointment of her reasonable expectations in said marriage, and inquire what she

8 has lost by her disappointment, and for that purpose consider, among other things, what would be the money value or worldly advantage of a marriage which would give her a permanent home, and the advantage of such a domestic establishment as would be suitable to her as the wife of a person of the defendant's estate and station in life; and, in this connection, the defendant's reputed wealth, as admitted of record, may be considered by the jury. The jury may also consider whether her affections were, in fact, implicated, and whether she had become attached to the defendant; and, if such was the fact, the wound and injury to her affections would be an additional element in the computation of her damages. The jury may also consider whatever mortification, pain, or distress of mind she suffered, resulting from the defendant's refusal to marry her. The jury may consider, also, whatever resulting ill health directly consequent upon the defendant's refusal to marry the plaintiff, if any is shown, and allow the plaintiff such additional reasonable compensation therefor as is justified by the evidence. And if, while the parties were mutually promised in marriage, and intending and expecting marriage, the defendant solicited, in consideration of such intention and expectation, and the plaintiff permitted, in consideration of such expectation and intention, sexual intercourse with her, these facts may be considered by the jury in computing damages, so far as they tend to aggravate and increase the disgrace, disappointment,

mortification, pain or distress of mind which she has suffered by reason of the defendant's breach of contract." The instruction presents the law in so far as it attempts to do so. The complaints are that it tells the jury that the plaintiff would have acquired "a permanent home," and the advantages of "a domestic establishment." The admitted facts justified such a conclusion. A stipulation shows the reputed wealth of the defendant to be from fifty thousand dollars to seventy-five thousand dollars, and it appeared without dispute that he had a good home. The court told the jury that it could consider her reasonable expectations in said marriage, and enumerated, as among such expectations, the fact of a home and the advantages of a domestic establishment. It is thought that the instruction gave the jury to understand that it could estimate the damage on the basis of her contingent right in case she survived the defendant as his widow, but we see nothing in the instruction to justify the thought. The elements of recovery, as specified, are different and distinct from those of a distributive share to a widow. There are some other complaints as to the instructions, but they are without merit, and consist in attaching importance to detached words or a sentence that, when considered as they should be, with other parts, properly present the law of the case.

IX. It is thought that the motion for a new trial should have been sustained. This, with the claim that the verdict is contrary to the weight of the evidence, and is the result of passion and prejudice, may be noticed together. The three claims go to the sufficiency of the evidence. There is a conflict of evidence, but there is no room for doubt that it was a question for the jury, and its verdict is conclusive. It is better that we do not attempt to elaborate the evidence. It could not well be done in the limits of an opinion. There does not seem to

be any way to reconcile the conduct of the defendant, except that he sought the plaintiff as a wife. It is consistent with that fact, or it establishes, conclusively, his villainy. If he sought her as a wife, there can be no doubt from his conduct, when with her and towards her, that the engagement was made, and then broken. If made and broken, the question of a justification in so doing, because of her character, was left, by clear instructions to the jury, under evidence so in conflict that its finding is conclusive. The judgment is for sixteen thousand dollars, but we do not regard it, in view of the defendant's wealth, and the great wrong inflicted on the plaintiff, in her seduction and betrayal, as excessive.

X. A serious complaint is made as to the argument of counsel for plaintiff to the jury, and the grossest of misconduct is charged. On oral argument we were impressed that counsel had so far overstepped the bounds of propriety as to justify a reversal of the case. It did not seem that such statements could have support in the record, so that, with the latitude for argument, the discretion of the district court could shield the verdict. A familiarity with the record has changed our conclusion. Some of the language
10 of counsel seems to be of no other significance than personal abuse. It dealt with the defendant as a usurer; as unscrupulous in methods and means to make money; as avaricious, cold, cruel, and treacherous. The charges were amplified by denunciations and comparisons. To one not acquainted with the record it would seem strange that such a case could present a line of evidence to warrant such language, or even afford a shield for counsel in the use of it. With a careful review of the record, we find few, if any, statements in the argument towards which the evidence does not tend to sustain as a conclusion. It must be understood that we only deal with the tendency

of the proofs, and not what is established. In the letters written by defendant, he was boastful of his money, and of his business accomplishments and methods. He was extravagantly profuse in his expressions of love for the plaintiff, and gave expression to thoughts and purposes which, in the absence of a purpose to make plaintiff his wife, which purpose he denies, went far to justify what was said of him in some of the particulars. We think it is not to be said that counsel might not have believed that the evidence proved the charges made. Defendant was a witness, as well as a party, and his conduct and character were involved in the investigation. That counsel might have gone somewhat to the extreme of his privilege does not necessarily warrant us in interfering with the discretion of the district court. We incline to the view that the discretion was fairly exercised. We have not quoted any of the language thought to be objectionable, because most of it is better omitted from than included in an opinion; and besides, the particular language could not well be understood in its relation to the case without presenting more or less of the record. Our conclusion from the whole record is that the judgment should be, and it is, **AFFIRMED**.

SUPPLEMENTAL OPINION ON RE-HEARING.

SATURDAY, MAY 29, 1897.

PETITION for re-hearing.—*Overruled*.

PER CURIAM.—In the opinion this language is used in considering complaints made as to the misconduct of counsel in argument: "Some of the language of counsel seems to have been of no other significance than personal abuse. It dealt with the defendant as a usurer; as unscrupulous in methods and means to make money; as avaricious,

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cold, cruel, and treacherous. The charges were amplified by denunciations and comparisons." The reference in the quotation to "personal abuse" should not be construed as a conclusion that such was its purpose or effect; nor should the language quoted, nor other language in the opinion, be construed as justifying personal abuse in argument by counsel. We designed no more by the language used than this: that some of the language, by which defendant was denounced in the manner stated, disconnected from much of the record, seemed to have no other significance than personal abuse, but that, in view of the disclosures by the record, because of which the character, conduct, and habits of the defendant became proper matters for comment and consideration, the inference of personal abuse was unwarranted. The control of counsel in this respect is, within the limits of a proper discretion, invested in the trial court. The most we have said in this case is that such a discretion was fairly exercised, in view of the record, which seldom has a parallel in judicial procedure. The petition for a re-hearing is OVERRULED.

W. E. MOORE, Appellant, v. THE CHICAGO, ST. PAUL & KANSAS CITY RAILWAY COMPANY.

Railroads: CONTRIBUTORY NEGLIGENCE. Where one having control
 1 of a team is driving over a railroad track at a street crossing without looking or listening for trains, or, where there are obstructions rendering looking useless, without stopping to listen, it is contributory negligence.

SAME. Whether plaintiff, in approaching a railroad crossing, was
 2 guilty of contributory negligence, because, after looking west
 3 when about sixty feet from the crossing, he saw no engine
 4 approaching, and then looked east but did not look west again
 5 until he was struck by a train, though he could have seen it if he had looked when about forty feet from the crossing, is a question for the jury, where he had no reason to expect a train to approach from the west rather than the east, and had a right to presume

109	595
103	673
102	595
111	548
102	595
114	88
102	595
118	362
102	599
118	362
102	595
119	531
102	595
120	116
120	648
120	658
120	665
102	595
125	276
125	656
126	16
102	595
132	589

that an engine would not be running at a greater speed than that prescribed in an ordinance.

EVIDENCE. Evidence that plaintiff injured at a railroad crossing by 4 cars moving over twenty miles an hour knew of the provisions of 6 an ordinance prohibiting trains from moving within the city limits at more than six miles an hour, is admissible on the question of plaintiff's contributory negligence in failing to look for a train from the direction from which the train which injured him came, within sixty feet of the crossing.

LADD, J., dissenting.

Appeal from Polk District Court.—HON. C. P. HOLMES, Judge.

SATURDAY, MAY 29, 1897.

ACTION to recover for personal injuries sustained by the plaintiff when driving across defendant's track at the crossing of east Eighth street, in the city of Des Moines, by reason of alleged negligence of the defendant's servants in the running and management of a locomotive engine. At the close of the testimony for the plaintiff, the defendant moved for a verdict, which motion was sustained, and verdict and judgment rendered accordingly. Plaintiff appeals.—*Reversed.*

St. John & Stevenson and Carr & Parker for appellant.

Cummins & Wright for appellee.

GIVEN, J.—This is the second appeal in this case. See 93 Iowa, 484. The questions now presented were not considered on the former appeal. Defendant's motion for a verdict was upon the ground that the evidence shows conclusively that the plaintiff was guilty of negligence contributing to the injury complained of, in that he did not exercise ordinary care in approaching and going upon the

defendant's track. Plaintiff contends that the evidence did not so show; that whether he was guilty of such negligence was a question for the jury; and that, therefore, the court erred in sustaining said motion and rendering said judgment. The rule in such cases is familiar and undisputed, and is well stated by defendant's counsel as follows: "That where the conduct of the person charged with negligence is such that there may fairly be different opinions with respect to it, where one man may honestly say it was in accord with ordinary prudence, and another may honestly say it was not, the question is one for the jury, and not for the court. The court is authorized to decide the question only when it is beyond the province of fair dispute." Guided by this rule, we are to say whether, under the evidence, the court erred in not submitting the question of plaintiff's negligence to the jury. In determining this, we must have in mind the care that the plaintiff was required to exercise, the circumstances under which he acted, and what he did, or omitted to do. It is conceded that he was bound to exercise ordinary care, that is the care that ordinarily careful, prudent persons would exercise under like circumstances. This rule is applicable to all such cases as this, and, in applying it, the courts have said that certain acts, when established, do, as a matter of law, constitute negligence. It has been often held that for one having control of the team he is driving to go upon a railway track, at a highway or street crossing, without looking and listening for trains, or, where there were obstructions to sight that rendered looking unavailable, without stopping to listen, was negligence. The law does not declare that a person about to go upon a railway crossing must look and listen, or stop and listen, at any particular time or place, but at the time and place that the exercise of ordinary

care requires. These well-recognized rules are not questioned, and we need not refer to any of the many authorities cited in the arguments.

II. There is no question but that it was the duty of the plaintiff to look and listen for trains before going upon this crossing, nor is it disputed that the evidence shows that he did look and listen. The contention is that he did not look at the time and place when and where the exercise of ordinary care required that he should have looked and listened. In determining this contention, we must look to the acts

of the plaintiff, and the circumstances under
2 which he acted. The circumstances were these:

The accident happened in the daytime, at the center of the crossing of east Eighth street. The numbered streets referred to run north and south, and are numbered from west to east. Shaw street, also referred to, runs east and west, and the defendant's track runs diagonally across that part of the city, its general direction being northeast and southwest. The track crosses Shaw street, west of Seventh, and Seventh, about three hundred and seventy-five feet west of the Eighth street crossing. The center of the Eighth street crossing is about one hundred and eighty feet north of the intersection of Shaw and Eighth streets. There were a dwelling house, out-buildings, and some trees on the west side of Eighth street, north of Shaw, between Shaw street and the track, that obstructed the view of the track to the west from Eighth street until within about sixty feet of the track. From this point the track could be seen as far west as Seventh street; and, as a traveler passed north, the view widened, so that at about forty feet south of the track it could be seen to the Des Moines river bridge about one thousand three hundred feet southwest of the Eighth street crossing. From the intersection of Shaw and Eighth streets the track

could be seen at Seventh, and for some distance west, but was hidden from view between Seventh and Eighth streets by said buildings and trees. On the day of the accident, the plaintiff, who was familiar with the locality, was driving north on Eighth street, in a one-horse covered delivery wagon, which was open on the sides and front from the seat forward, so that

3 the cover did not obstruct his view. Plaintiff alone testifies as to what he did when approaching the crossing. He testifies that his horse was gentle and under control; that he was driving north on Eighth street, at a slow trot, a little faster than a walk, which speed he continued until struck by the engine. He says that, when crossing Shaw street, he listened and looked west, to see if any engine or train was approaching, and neither saw nor heard any; that, after passing said obstructions at a point about sixty feet south of the crossing, he looked west along the railroad almost to Seventh street, and saw nothing approaching; that he then looked east, and did not again look west, nor know of the approach of the engine from the west until it was about to the west sidewalk on Eighth street. He says he was listening for sounds of an approaching engine, and that he heard no signals. Other witnesses testified that no signals were given, and that the engine was backing at from twenty to thirty miles an hour. An ordinance of the city provides that locomotive engines shall not be run within the city limits at a greater rate of speed than six miles per hour, and that the bell shall be rung on approaching

4 street crossings, and when any person or animal may be upon the track. While these requirements did not relieve the plaintiff from the exercise of ordinary care, nor from the duty of looking and listening, they, and the presumption that they would be observed, are proper to be considered in determining whether the plaintiff was negligent. He had no reason

to expect an engine or train to pass from one direction more than from the other; hence it was his duty to look in both directions. He had a right to presume that no engine would be run at a greater speed than that prescribed in the ordinance, and
5 that the bell would be rung at crossings as required. We have seen that, if plaintiff had looked west when about forty feet south of the crossing, he must surely have seen the approach of this engine, in time to have stopped and avoided the accident. The contention is that he was negligent in not again looking west after he passed the point sixty feet south of the track. We do not think it should be said, as a matter of law, that plaintiff was guilty of negligence in not again looking westward after he passed the point sixty feet south. He had looked westward at Shaw street, and from the sixty-foot point, and saw nothing approaching; was listening, and heard nothing. It was his duty to look east as well as west, and he did so. While we do not say that the plaintiff was not negligent, we do not think that it should be said, as a matter of law, that he was. Whether, in view of all the circumstances under which he acted, he was negligent, is a question about which we think men may honestly differ, and therefore one that should have been submitted to the jury. Counsel present calculations based upon estimates of time, the speed of the engine and horse, and measurements of distance, to show that the plaintiff was, or was not, negligent. Such estimates are not usually exactly correct, but mere approximations, and it should be left to the jury to determine what basis, if any, they may afford for a conclusion.

III. Plaintiff offered to prove that he knew of the provisions of said ordinance. This evidence was excluded upon defendant's objection that it was irrelevant, immaterial, and incompetent. We think it is

certainly relevant and material to know whether the plaintiff acted with or without a knowledge of those requirements. It could only be incompetent upon the theory that plaintiff was presumed to know what this ordinance required, but that presumption does not render incompetent evidence that confirms it as a fact.

For the reasons stated, we conclude that the judgment of the district court should be REVERSED.

LADD, J. (concurring).—I concur in all but the last paragraph of the foregoing opinion, but am unable to agree with the conclusion that a party may prove his knowledge of the provisions of an ordinance, which he is presumed to know without proof. Authorities are not required to sustain the proposition that every person is conclusively presumed to know the law, and that all persons within the limits of a city, or having property therein, are charged with full notice of the provisions of its ordinances. But see 17 Am. & Eng. Enc. Law, 254, and cases cited; *Gosselink v. Campbell*, 4 Iowa, 296. As a matter of public policy, the fact of such knowledge and notice is conclusively presumed, and requires no confirmation. If evidence is admissible tending to establish plaintiff's knowledge of the provisions of an ordinance, as bearing on the charge of contributory negligence, then it may also be received as tending to show want of such knowledge; and, if such an investigation is permissible in determining the issue as to plaintiff's negligence, then equally must it be passing on the issue as to the negligence of the engineer controlling the defendant's train. And all this for what purpose? Strengthening or weakening a fact that is conclusively presumed. Such inquiries could serve no useful purpose, and ought not to receive the sanction of this court.

102	602
110	659
102	602
121	466
102	602
140	186

N. K. BEECHLEY V. JOHN MULVILLE, *et al.*, Appellants.

Insurance: CONSPIRACY. Insurance is a commodity within McClain's Code, section 5454, prohibiting the formation of combinations or confederations between individuals or corporations to regulate or fix the price of "oil, lumber, coal, * * * or any other commodity."

RATE COMPACT. A compact between local insurance agents in a city to fix the rates upon all risks therein, imposing certain penalties for taking of risks at less rates than those fixed by the association is within the inhibition of McClain's Code, section 5454, forbidding the formation of combinations or confederations to regulate the price of any commodity.

REMOVAL OF AGENT UNDER. A local insurance agent who was a party to a compact within the inhibition of McClain's Code, section 5454, against the formation of combinations to regulate the price of commodities, cannot recover damages from the other members of the compact, and the insurance company for the withdrawal of the agency from him because of his violation of the compact agreement, where the withdrawal is in pursuance of a provision of the compact imposing such penalty for a violation of its provisions, and the company had the right to withdraw its agency at pleasure. He lost nothing but agencies which the compact gave him. As the compact was illegal, he lost nothing but an illegal business, made so by a conspiracy to which he was a party.

Conspiracy. A conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action.

Appeal from Linn District Court.—HON. W. P. WOLF
Judge.

WEDNESDAY, FEBRUARY 3, 1897.

ACTION for damages because of a conspiracy to destroy plaintiff's business as an insurance agent. Judgment for plaintiff, and the defendants appealed.—*Reversed.*

Jamison & Burr and *A. R. West* for appellants.

Smith & Smith and *C. J. Deacon* for appellee.

GRANGER, J.—I. The defendants are, besides John Mulville, Henry Bennett, the Detroit Fire & Marine Insurance Company of Detroit, Mich., and the Phoenix Insurance Company of Hartford, Conn.

Charles T. West was named as a defendant, but
1 not served. The plaintiff was an insurance agent at Cedar Rapids, Iowa, and on the fourteenth day of November, 1883, he became a member of the "compact" or organization styled the Cedar Rapids & Marion Underwriters' Union. The agreement is embraced in a writing, denominated "Compact," the first division of which is as follows:

"Compact.

"The Cedar Rapids and Marion Underwriters' Union.

"We, the undersigned, local agents of Cedar Rapids and Marion, Iowa, agree to enter into the following compact, with Henry Bennett, as manager, who shall be required to give a good and sufficient bond in liquidated damages not to engage in the business of fire insurance as a local agent, directly or indirectly, in Cedar Rapids or Marion, for a period of not less than three years from the date of his vacation of office, the expense of such compact and manager to be paid by the companies on a *pro rata* basis of receipts. The duties of said manager to be as follows: (1) To fix rates upon all risks in Cedar Rapids and Marion and vicinity of each, which he shall promulgate and furnish to all agents at once. (2) He shall pass upon and approve by his official stamp (which shall bear no erasures or alterations) all the monthly accounts, abstracts, and daily reports, reports of transfers of location of risks, and indorsements, and mail same to various companies or general agents; also, all policies, renewal receipts, or certificates of insurance on which a return premium is charged to

the company, or allowed by the agent. (3) He shall investigate all irregularities which may come under his notice, and have power to examine the books and papers, and take the written statement of any agent, under oath, and enforce such penalties for violation as are hereinafter prescribed in this agreement; and in case of failure or refusal of any agent to pay any penalty assessed under this clause, within ten days, the manager shall have power, and it shall be his duty, to take possession of the books and papers of the company or companies in such agency, providing the manager shall first obtain from such company or companies a written order therefor, and hold the same subject to their order, it being conditioned only that the infliction of a money penalty on an agent or agents shall cover all offenses prior thereto, except that nothing herein shall prevent the manager from peremptorily ordering canceled any policy or policies theretofore issued in violation of this compact and pledge, and prohibiting such agent or agents from writing upon the risk or risks for one year thereafter; and any risk shall be considered as an offense, irrespective of the number of policies issued thereon. Now, therefore, in consideration of the appointment of such manager, we, the undersigned local agents, do hereby agree to and associate ourselves together, under the name of the Cedar Rapids and Marion Underwriters' Union, with the following organization, pledge, and penalties."

The other divisions of the compact are under the headings "Organization," "Pledge," and "Penalties." After some provisions as to organization is the following, as a part of the pledge: "We also agree strictly and honorably to adhere, both in letter and spirit, to the following pledge, viz.: Section 1. That we will not write a risk until a rate has been fixed by the manager, and will adhere to all the rates fixed by him;

that we will not issue a policy ourselves or cause insurance to be written by any company at less than said fixed rates; and, in the event of binding an unrated risk, we will submit an application for rating thereon to the manager, upon the same or next succeeding business day to that on which such risk was bound." After other pledges is the subject of penalties, under which it is provided that an offending member may be required to cancel a policy under which an offense is committed, and shall be prohibited from writing upon the same risk for one year. Then follows a provision for the imposition of fines for a first and second offense, and for the third offense the removal of all companies from the offending member, and expulsion from the compact.

This compact is signed by some thirty-five agents and two insurance companies, not, however, including either of the defendant companies. The defendant Bennett was unanimously accepted as manager, and assumed the duties of the office December 1, 1883. The plaintiff was one of the signers of the compact. Another compact, consisting of members of the former compact, seems to have been formed July 28, 1884, signed by some nineteen of the agents, including the plaintiff, designed to compete "with non-compact insurance companies," with the same person as manager. The defendant Mulville was special agent for the Detroit Fire & Marine Insurance Company, and West, the defendant named, but not served, was such agent for the other defendant company. Prior to November, 1889, the plaintiff had been the local and soliciting agent of the two defendant companies, and other companies at Cedar Rapids, Iowa, and, by selling insurance at less than the prescribed rate under the compact, a fine had been imposed, and also other penalties as to writing insurance. Plaintiff refused to pay the fine, and insisted upon his right to solicit

insurance where he pleased. It is averred in the petition that, because of this, defendant Bennett and the other defendants confederated together to destroy his business as an insurance agent, and that, because of such confederation, the defendant companies, and the others for whom he was acting, canceled their contracts with him, because of which his business was lost, which he claims was worth one thousand dollars per year. The defendants, all except West, answered by a general denial, and the Phoenix Insurance Company pleaded its contract of employment with plaintiff, as in writing, and its right to discharge him at any time it pleased. It also pleaded an estoppel because of plaintiff's membership in the compact.

The jury returned special findings to the effect (1) that plaintiff was a party to the compact at the time he received his appointment from the defendant companies; (2) that, at the time he received the appointment, he did not agree to conform to the rules and regulations of the compact; (3) that he did violate the rules of the compact before the agencies were taken from him; (4) that the agencies were not taken because he refused to comply with the rules of the company as provided in his agreement, but that other reasons existed therefor; (5) that a combination or conspiracy was entered into between the defendant companies and others for the purpose of injuring plaintiff; (6) that plaintiff had no contract with the defendant companies to be their agent, except during their pleasure; (7) that plaintiff was injured, in the taking away of the agencies of the defendant companies, otherwise than in the privilege of soliciting insurance for them in the future as in the past, and the loss of the probable earnings in the way of commissions he might have earned had he been permitted to continue as agent; and (8) that the combination to

injure his business was formed after plaintiff's refusal to comply with the regulations of the compact.

As to the second finding, that plaintiff, at the time he received his appointment from the defendant companies, did not agree to conform to the rules and regulations of the compact, nothing more can be intended that it is not so specified in the agreements, which are in writing. If more was intended, it would be without support in the evidence. The fact clearly appears that these agencies were taken while plaintiff was a member of the compact, and observing its regulations, and that these agencies were a part of his business as a member of the compact.

As to the fourth finding, that the agencies were not taken from plaintiff because he refused to comply with the rules of the companies, as provided in his agreement, but for other reasons, the record will only justify the conclusion that the reason for which they were taken is the violation of the rules of the compact. It may be important hereafter to notice other facts.

II. The following is section 5454 of McClain's Code, being section 1, chapter 84, Acts Twenty-second General Assembly: "If any corporation organized

under the laws of this state or any other state
2 or country for transacting or conducting any kind of business in this state, or any partnership or individual shall create, enter into, become a member of or party to any pool, trust, agreement, combination or confederation with any other corporation, partnership or individual to regulate or fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever; or shall create, enter into, become a member of or a party to any pool, agreement, combination or confederation to fix or limit the amount or quantity of any commodity or article to be manufactured, mined, produced or sold

in this state, they shall be deemed guilty of a conspiracy to defraud, and be subject to indictment and punishment as provided in the next section." It is thought by appellants that such statute has no application to insurance companies, but the only reason assigned for it is that the same subject has been before each successive legislature since the act passed, and no one has thought that the act referred to such companies. However that may be, we have no doubt of its application to insurance companies because of the language of the act. There is a manifest purpose to make the section comprehensive as to the subject-matter, as well as to persons, both natural and artificial, coming within its prohibitions. It prohibits combinations to fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity, or article whatever. Insurance is a commodity. "Commodity" is defined to be that which affords advantage or profit. Mr. Anderson, in his Law Dictionary, defines the word as "convenience, privilege, profit, gain; popularly, goods, wares, merchandise." We see no reason why, in the act, the word should be restricted to its popular use. It is common to speak of "selling insurance." It is a term used in insurance business, and law writers have, to quite an extent, adopted it. Again, there are the same reasons why it should be protected against combinations as there are in matters clearly within the provisions of the law. The district court instructed the jury that the combination was prohibited by the act in question, and we think the holding was right.

III. At the close of the evidence, defendants moved the court to direct a verdict for them under the undisputed facts, and we think it should have been done, notwithstanding our holding that the act above referred to applied to insurance companies. In view of our conclusions as to the applicability of the law to insurance companies, and with the statement

that we regard the compact in question as clearly within its provisions, we may pass much that is said in argument by appellee, as to the combination and its character. Reliance is placed on the finding of a conspiracy to injure plaintiff, and there is a finding by the jury that a conspiracy was so formed after the refusal of plaintiff to comply with the regulations of the compact. No such a conspiracy as that is pleaded. It is pleaded that a conspiracy was formed in the organization of the compact, and it is then pleaded that, after the violations of the terms of the compact by plaintiff, these defendants joined together, and assumed to cancel the contracts then existing between plaintiff and the companies of which he was agent, and this is likely what is meant by such conspiracy. With the understanding of what is meant, we need not make nice distinction about the words used. We do not understand it to be contended,—and, if it is, the contention is unwarranted,—that, after the refusal by plaintiff to comply, there was any combination formed other than that the fines were imposed, and the agencies revoked, because of the refusal to observe the terms of the compact. These were results contemplated by the compact, and the means to that end were such as must have been contemplated when the compact was organized. All that can be said is that the defendants, understandingly, acted together to enforce the rules and penalties of the compact. Any claim that they so acted with a purpose to injure plaintiff, except as injury would necessarily result from the enforcement of the regulations of the compact, is entirely without support in the record. The court said to the jury:

“(10) If it appears from the evidence that plaintiff's commissions of appointment from the companies represented by plaintiff provided that they might withdraw their agencies from him at any time without

giving any cause therefor, then the plaintiff could not recover damages on account of such withdrawal, unless you further find that such withdrawals were made through and in pursuance of a design to injure the plaintiff, and as a part of a conspiracy among defendants, or among them and others, to wrong plaintiff, or to inflict punishment upon him for refusal to comply with the said unlawful compact or union." We quote the instruction, because it indicates the mind of the court as to the real basis of recovery, under the evidence. One of the special findings is that the companies had the right to withdraw their agencies at pleasure, and, with that right fixed, the right of recovery is made to depend on the *purpose* with which the right was exercised; that is, was it done *intending* to injure the plaintiff? Concede, for the purpose of the case, the rule that such a recovery could be had, and the record will then defeat a recovery. It is not difficult to illustrate the situation. Had the companies, without reference to the compact, revoked the agencies, as they could rightfully do, the injury to plaintiff's business would have been the same, but without redress. Now change the purpose, so that the revocations are in pursuance of the terms of the compact, and we have precisely this case. The revocations have now been caused by an unlawful combination. Of this combination plaintiff was a member. The penalties imposed, among which is that of "removal of all companies from the offending member," are specified in the compact, and his name is signed thereto. He is himself one of the conspirators who devised and put in operation that which caused his injury. Bennett was but the agent. He did what the plaintiff and others directed. It can be said, undoubtedly, that plaintiff has caused the injury of which he complains by his unlawful acts. Take from

the case, such acts, and the result, of which he complains, could not have happened.

It will be conceded, we think, that, independent of what is termed a "conspiracy," the acts complained of in this case would not afford a right of action, for

what is claimed is that the conspiracy or combination caused the acts. Mr. Cooley, in his work on Torts (2d Ed.), p. 143, says: "The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give the right of action." The rule is approved in *Jayne v. Drorbaugh*, 63 Iowa, 711. See, also, *Kimball v. Harman*, 34 Md. 407; *Robertson v. Parks*, 76 Md. 118 (24 Atl. Rep. 411); *Laverty v. Vanarsdale*, 65 Pa. St. 507. This case seems to be clearly within the rule. A verdict should have been directed for the defendants.—REVERSED.

SUPPLEMENTAL OPINION ON RE-HEARING.

SATURDAY, MAY 29, 1897.

GRANGER, J.—In a petition for a re-hearing there is a very persistent contention that because of a conspiracy, the plaintiff has been deprived of a valuable business; and it is urged, that notwithstanding his connection with the organization of the compact, and his continued membership therein, he could not, by unlawful means, be deprived of property rights, and reliance is placed on the holding in *Printing Co. v. Howell*, 26 Or. 527 (38 Pac. Rep. 547). We readily indorse the holding in that case. It is a case in which a typographical union, an unincorporated voluntary association, with rules for the regulation of its membership (an object of the union being to establish an equitable scale of wages, and to protect its members from sudden or unreasonable fluctuations in the rate

of compensation for their labor, etc.), attempted, in an unlawful manner, to compel members of the union and others to quit the employment of the plaintiff, a company engaged in lithographing, engraving, printing, and publishing journals, newspapers, etc. It appears that members of the union went upon the premises of the plaintiff and intimidated members of the union there employed, by threats to enforce the rules of the union against them, so that, against their will, they quit such employment, to the injury of the plaintiff. The record in that case shows other acts of an unlawful character to the injury of the plaintiff. It appears in that case that a conspiracy was formed by the executive committee of the union and its members to destroy the plaintiff's business, or compel it to submit to the rules of the union, of which it was not a member. The opinion, after defining or specifying some things lawful for such organization, states: "No resort can be had to compulsory methods of any kind to increase, keep up, or retain such memberships. Nor is it permissible for associations of this kind to enforce the observance of their laws, rules, and regulations through violence, threats, or intimidation, or deprive persons of perfect freedom of action." The opinion holds, that such organizations may preserve their membership by reasoning, fair arguments, and even by persuasion and entreaty. It is to be remembered that the organization was a legal one, its methods to enforce its objects only being held illegal. The illegalities consisted in attempts to injure the plaintiff's business, which was legal, and interfering in an unlawful manner with the freedom of its employees. The case at bar has none of the features of that case. In this case the plaintiff was a member of an unlawful combination or compact. For six years or more he had been such, and the agencies, the loss of which constitutes the injury complained

of, came to him as a member of the compact, under an agreement to do the business of the agencies under the rules of the compact, and hence he had no lawful business. The transaction, in its entirety, was unlawful. There is not a semblance of a showing of a right to the agencies, except the will of the companies, and then only by virtue of the compact. We do not hold, that had there been a dollar of the lawful property or rights of the plaintiff taken because of his failure to observe the rules of the compact, he might not recover it. That question is not involved. It is purely an action for damages because of the loss of his business as an insurance agent, and it appears that, in a legal sense, he had none. What he did have, as we said in the opinion, he lost by his own illegal acts. He helped to put in operation the causes that deprived him of it. The petition for a re-hearing is OVERRULED.

F. E. ZALESKY V. THE HOME INSURANCE COMPANY,
Appellant.

Practice: CONDITION PRECEDENT TO SUIT ON POLICY: *Appraisalment.*

- 4 In the absence of a statute to the contrary, clauses in an insurance
6 policy providing for an appraisalment before suit is brought must
be complied with by the assured before he can commence suit on
the policy; and suit before so complying is premature.

SUPPLEMENTAL PETITION. Code, section 2731, providing that plain-
8 tiff may make a supplemental petition alleging facts which have
happened or come to his knowledge since the filing of his petition,
8 does not authorize the plaintiff to plead and prove a demand for an
appraisal, required by the policy of insurance, sued upon, after
the action was commenced.

CONTINUANCES. It is error to grant a continuance to permit plaintiff
9 to demand an appraisalment which could in no event avail him.

Insurance: APPRAISEMENT. The demand for an appraisalment, and a
1 request of the insured by the insurer to designate an appraiser and
2 fix a date for the appraisalment, which is refused, is a compliance
7 by the insurer with an agreement that, in case of disagreement,

109	613
108	313
109	613
101	566
104	170
109	613
108	341
102	613
5114	517
102	613
1127	381
102	613
139	138
141	150

each party shall select an appraiser, and the two chosen shall select a third, and that the appraisers shall then estimate the loss.

Appeal: RULING ON DEMURRER. In a suit on a fire insurance policy
5 defendant set up by answer a demand for an appraisal, and refusal, to which plaintiff demurred, and demurrer was overruled, from which no appeal was taken, and the question was not afterwards raised on the trial. *Held*, that the overruling of the demurrer, not being appealed from, was an adjudication that the facts stated by the defendant's answer were sufficient to constitute a defense, and whether a statutory provision would render such facts pleaded in answer insufficient as a defense cannot be determined on appeal.

Appeal from Benton District Court.—HON. GEORGE W. BURNHAM, Judge.

MONDAY, MAY 31, 1897.

THIS is an action against the defendant upon a policy of insurance to recover for the loss of a building in the city of Belle Plaine, Iowa. The facts, so far as material to the questions presented on this appeal, will be found in the opinion. The cause was tried to the court and a jury, and a verdict rendered for the plaintiff under the direction of the court, upon which judgment was entered, and the defendant appeals.—*Reversed*.

McVey & McVey for appellant.

W. S. Scrimegeour and J. J. Mosnat for appellee.

KINNE, C. J.—I. The policy sued upon contains the following provisions: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deductions for depreciations, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality.
* * * Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided, and, the amount

of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company, to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within reasonable time, on giving notice, within thirty days after the receipt of

the proof herein required, of its intention so to
1 do. * * * In the event of disagreement as

to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first elect a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of loss. The parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expense of the appraisal and umpire. * *

* This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. * . * *

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the

foregoing requirements, nor unless commenced within twelve months next after the fire."

The answer avers that the parties could not agree upon the amount or extent of the damage, and that the defendant in writing demanded of the plaintiff that an appraisal be made of the amount of the loss on or before September 27, 1894, and that plaintiff refused to accede thereto; that the submission to an appraisal for the purpose of ascertaining the amount of the loss and damage is a condition precedent to the right to maintain an action, and that the loss is not payable until after an award by the appraisers has been made; that such appraisement and award has not been made on account of the fault of plaintiff. To this part of the answer the plaintiff demurred, on the ground that the allegations of the answer constituted no defense to the action, "because the provisions and requirements there set out for an appraisement are null and void, and contrary to the laws of this state, and are not a condition precedent to the bringing of suit by the plaintiff, and for the further reason that the demand for an appraisal * * * is vague, uncertain, and indefinite, in that it fixes no time when said appraisal should be made, and it names no person or persons who are to make said appraisal on part of the defendant, and said defendant did not, in said demand for an appraisal, offer to select a disinterested appraiser on its part, as required by the terms of said policy, * * * nor did said defendant, in said demand for an appraisal, provide for the appointment of an umpire." This demurrer was overruled by the court, and the plaintiff filed a reply alleging, in substance, that the defendant was estopped from insisting upon an appraisement because it had not named or selected an appraiser; that defendant had waived any appraisement by submitting to plaintiff an estimate of the amount of plaintiff's loss long after its demand was made for an appraisement, and after this suit was

commenced, and was willing to settle with plaintiff on the basis of said estimate. To this reply the court sustained a demurrer. Thereupon the plaintiff filed a motion for a continuance "for the purpose of selecting and choosing an appraiser to appraise the amount of loss which the plaintiff sustained under said policy, * * * and offers and tenders the name of Joseph Swaziek to the defendant as an appraiser on the part of this plaintiff, and fixes the place of appraisal at Belle Plaine, Iowa, and the time of said appraisal to take place on the fifth day of February, 1895, at 10 o'clock A. M. of said day." The affidavit attached to the motion stated that the plaintiff could not proceed with the trial at that term because no appraisal of the loss had been made. The defendant filed objections to the granting of a continuance, which were overruled and a continuance granted. Thereafter the plaintiff filed a supplementary petition, wherein, among other things, he set forth the fact that he had selected an appraiser, and fixed a date for an appraisement, and had notified the defendant of such facts; that the defendant had neglected and refused to select an appraiser, and had refused to fix a date for the appraisement of plaintiff's said loss; that the building which was burned, and upon which the policy in suit rested, was wholly consumed by fire July 28, 1894, so that it could not be told, from an examination of the ruins or of the ground where said building stood, how or in what manner said building had been constructed, nor could any appraisement be made without the aid of evidence of persons familiar with the building. To this petition the defendant demurred, on the ground that the court had held an appraisement of the loss to be a condition precedent to the right to bring an action; that plaintiff cannot bring his action, and thereafter serve notice of an appraisement, and claim that the same is a compliance with the provisions of the policy; that the defendant

cannot pursue his remedy by appraisement while his action is pending to recover on the policy; that the demand for an appraisement was made too late. This demurrer was overruled, and the same questions were raised by an answer filed by the defendant. The cause then proceeded to trial. At the close of the evidence the defendant raised the same questions by a motion for a verdict, which was overruled. Thereupon the plaintiff moved the court to instruct the jury to return a verdict for him, for the reason that there "is no controversy that this property is of greater value than the amount of the policy in evidence, and upon the whole record the plaintiff is entitled to a verdict." This motion was sustained, and a verdict returned accordingly.

From the foregoing statement it will be seen that the chief contention between the parties is as to whether or not, under the provisions of the policy, an appraisement, when demanded by the company, was a
4 pre-requisite to the commencement of a suit on the policy, and, if so, whether the provisions of the policy were complied with by the plaintiff taking the necessary steps for an appraisement after he had instituted his suit, or, whether under such circumstances the suit was prematurely brought. Counsel for appellee makes the claim in argument that the statute (chapter 211, Acts Eighteenth General Assembly) supersedes the provisions of the policy with reference to an appraisement, and that under it nothing need be done before bringing suit, by one claiming a loss under a policy, except those things which the statute expressly provides. In other words, the claim is that the statute provides in express terms the only conditions precedent to the maintenance of an action on a policy of insurance, and that an appraisal is not one of those conditions. The question thus presented is very important, and, if it had been properly presented in this case, would, if decided in favor of the appellee, be decisive of

this appeal. But this question, as we view the record, is not before us for determination. The only
5 place where it was raised was in the demurrer to the answer. That demurrer was overruled, and the question was not afterwards raised upon the trial. The plaintiff did not attempt to raise the same question in his reply. He acquiesced in the ruling of the court, which in effect held that, notwithstanding the provisions of the statute referred to, an appraisal was necessary; and he does not appeal. Under these circumstances we cannot determine the question as to whether the statute fixes the only conditions precedent to the bringing of the action, regardless of the requirements of the policy. The ruling of the district court on the plaintiff's demurrer to the answer not being appealed from, and the questions not thereafter being raised in the trial court, the law as thus held by said court, whether correct or not, controlled in the trial of the case.

II. We have seen that the district court held, in effect, that under the provisions of the policy an appraisal, having been demanded by the company, was a condition precedent to the bringing of an action on the policy. No appeal having been taken from its ruling in that respect by plaintiff and no further questions touching it having been raised during the trial, it should have been conducted in accordance with the theory of the law so adopted by the court. So, under this condition of the record, we must hold that an appraisal, if demanded, was a condition precedent
6 to the bringing of a suit upon its policy. Nor, in the absence of statute provisions to the contrary, can it be doubted that, under a policy containing provisions like the one involved in this action, an appraisal is a condition precedent to the bringing of an action on the policy. *Gasser v. Sun Fire Office*, 42 Minn. 315 (44 N. W. Rep. 252); *Mosness v. Insurance*

Co., 50 Minn. 341 (52 N. W. Rep. 932); *Levine v. Insurance Co.* (Minn.) 68 N. W. Rep. 855; *Chippewa Lumber Co. v. Phoenix Ins. Co.*, 80 Mich. 116 (44 N. W. Rep. 1055); *Old Saucelito Land and Dry Dock Co. v. Commercial Union Assur. Co.*, 66 Cal. 253 (5 Pac. Rep. 232); *Adams v. Insurance Co.*, 70 Cal. 198 (11 Pac. Rep. 627); *Carroll v. Insurance Co.*, 72 Cal. 297 (13 Pac. Rep. 863); *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. C. 28 (10 S. E. Rep. 1057); *Herndon v. Insurance Co.*, 107 N. C. 191 (12 S. E. Rep. 241); *Wolff v. Insurance Co.*, 50 N. J. Law, 453 (14 Atl. Rep. 562); *Insurance Co. v. Clancy*, 71 Tex. 5 (8 S. W. Rep. 630); *Hutchinson v. Insurance Co.*, 153 Mass. 143 (26 N. E. Rep. 439); *Chapman v. Insurance Co.*, 89 Wis. 572 (62 N. W. Rep. 422); *Hamilton v. Insurance Co.*, 136 U. S. 242 (10 Sup. Ct. Rep. 945). There is a class of cases, based upon policies wherein an award is provided for, but containing no provision prohibiting the bringing of suits until after such an award is made, in which it is held that an appraisal is not a condition precedent. See *Hamilton v. Insurance Co.*, 137 U. S. 385 (11 Sup. Ct. Rep. 133), and cases cited. It must not be forgotten that we are not considering the effect of the statute upon such policy provisions as

the one before us, as, for reasons already stated,

7 that question is not before us. The defendant company made a demand for an appraisement in due time, and requested plaintiff to designate his appraiser and fix a date for the appraisement, which he failed and neglected to do. It had complied with the provisions of the policy in that respect.

III. Under the provisions of the policy, and under the law of the case as held by the trial court, an appraisement being a condition precedent to the bringing of a suit on the policy, was the demand for an

8 appraisement by the plaintiff after the suit had been brought, or his acquiescence, after he had brought his suit, in a demand for an appraisement made

by the defendant long before the suit was brought, a compliance with the provisions of the policy? The provisions of the policy, which need not be again set out, are explicit in requiring an appraisement, when one is demanded, prior to the bringing of the action on the policy. The loss does not become payable, in case an appraisement has been demanded, until an award of the appraisers has been made, nor until the assured has complied with all of the requirements of the policy. An appraisement, as we have seen, was demanded by the company; it was not acceded to by the assured; it was never made; and, as this failure to comply with this provision of the policy was through no fault of the defendant company, there existed no right to bring the suit at the time it was instituted. It was, therefore, prematurely brought. Such being the case, the plaintiff could not, by filing a supplemental petition setting out a demand for an appraisal, made after the beginning of his suit, cure the defect as to the suit pending, unless by virtue of the statutory provision to be hereafter considered.

IV. Our statute provide: "Either party may be allowed, on motion, to make a supplemental petition, answer, or reply, alleging facts material to the case, which have happened or have come to his knowledge since the filing of the former pleading; nor shall such new pleading be considered a waiver of former pleadings." Code, section 2731. Appellee claims that, under this section, he could properly plead and prove the demand for an appraisal made by him after the action was commenced. We do not think it can be held that this statute was intended to apply to a state of facts such as this record discloses. Appellee relies upon the following cases: *Insurance Co. v. McCrea*, 4 G. Greene, 229; *SeEVERS v. Hamilton*, 11 Iowa, 66; *Sigler v. Gondon*, 68 Iowa, 441; *City of Davenport v. Mitchell*, 15 Iowa, 195. The case in 4 G. Greene was a

suit in equity. By the terms of the policy the company was not liable to pay until sixty days after the loss. The petition was filed within the sixty days. The defendant demurred, and the plaintiff obtained leave to file a supplemental petition setting out that the sixty days had expired and the claim was then due. The only reason given by the court for holding that the supplemental petition should not be dismissed is that the cause was within the equitable jurisdiction of the court, and the court, after once obtaining jurisdiction, would retain it for all purposes. Such a reason, if good in that case, has no application to the case at bar, which is a law action. The *Seever's Case* was one involving no question of a condition precedent, but on a prior appeal the court held that the plaintiff could recover, and that it ought to appear that a certain judgment had been assigned to the defendants, and that they should not be put to the expense of setting aside the satisfaction of the judgment. No question was made as to the right of plaintiff to recover, but, the plaintiff having complied with the proceedings which the court intimated as necessary, and set up such facts in a supplemental pleading, it was held he might recover. *Sigler's Case* was an action to recover rent. After the action had been commenced another installment of rent became due, and recovery of it was sought by a supplemental petition filed in the original action. It was held that this might be done. It is to be observed that in that case the action was properly brought, and the liability of the defendant by lapse of time became enlarged during the pendency of the action. None of these cases authorize the construction of the section of the Code quoted, contended for by the appellee. Here we have a case where, by the contract of the parties, no suit could be commenced until after an appraisement, in case one was demanded. An appraisement was demanded. Without acceding to such demand, and without any excuse for failing so to

do, and in plain violation of the provisions of the contract, the plaintiff brings this action. Thereafter he attempts to comply with the contract by demanding an appraisalment. If he can thus ignore the provisions of the contract which are precedent to his right to bring an action, and if he may thereafter at his pleasure demand the appraisalment, it is manifest that he thereby in effect, and without the consent of the other party, renders of no effect a material provision in the contract. Such a construction of this statute would practically avoid and render of no effect every provision in any contract which made the right to institute an action to depend upon the doing of an act which the parties themselves had agreed should be done before a suit could be brought. We cannot presume, in the absence of express language to that effect, that the legislature intended to thus interfere with and virtually abrogate provisions in contracts which go to the right to institute an action. The statute relied upon does not apply. The court should have sustained the demurrer to the supplemental petition. It also follows, from what we have said, that the court erred in continuing the case to enable the plaintiff to demand an appraisalment, as such demand, made after the suit had been commenced, could in no event avail plaintiff, if such an appraisalment was a prerequisite to the commencement of the suit, as the court had already held. As we have said, the question as to whether a policy holder may not institute his suit after compliance with the provisions of the statute, and regardless of further or other provisions of the policy, is not before us, and is not, therefore, determined.

V. Appellant contends that, even if it should be held that plaintiff could demand an appraisalment after he commenced his suit, still, in any event, such demand on his part must be made within a reasonable time after the loss occurred, and that, in fact, his demand was

made five months or more after the loss occurred; and it is said that this was not within a reasonable time. Under our holding, that, in the absence of statute provisions to the contrary, an appraisal demanded after the suit has been commenced is not in compliance with the provisions of the policy, and not in time, it is not necessary that we consider whether or not the appraisal in fact demanded by the plaintiff was asked for within a reasonable time after the loss occurred. Other questions are argued, some of which, in view of our holding, are not material, and others may not arise upon another trial. The court erred in directing a verdict for the plaintiff.—REVERSED.

102 624
114 507

THE CITY OF ALBIA, Appellant, v. THE CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY.

Crossing and Viaduct: RAILROADS. In view of Acts Twenty-second
 1 General Assembly, chapter 32, granting to cities of the first class
 and certain cities of the second class the right to require railway
 2 companies to erect viaducts under certain specified conditions,
 and limitations, the words "good, sufficient and safe crossings" in
 3 Code, 1873, section 1288, providing that every railway corporation
 shall construct at all points where its road crosses any public high-
 way, good, sufficient and safe crossings and cattle guards, refer to
 4 grade crossings, only, and do not cover overhead crossings or via-
 ducts rendered necessary by the establishment of a highway after
 the construction of a railroad.

SAME: Cities and towns. An incorporated city or town may lay out
 2 and establish streets over a railroad right of way to the same
 extent as over other private property.

SAME. In the absence of express legislation, a railroad company can-
 3 not be required to construct crossings over its right of way in
 order to prolong or connect streets established after the location
 and acquisition of the right of way.

Appeal from Monroe District Court.—HON. M. A.
 ROBERTS, Judge.

MONDAY, MAY 31, 1897.

ACTION atlaw to compel the defendant to construct and maintain a crossing over its right of way in one of the streets of the city of Albia; and to assess the damages defendant has sustained by reason of the taking of part of its right of way for highway purposes. There was a trial to a jury, resulting in a verdict and judgment finding that defendant was entitled to damages in the sum of four hundred and twenty-one dollars, and that plaintiff should build and maintain at its own expense the viaduct needed to effectuate the crossing. The judgment further required of plaintiff that it elect within one year whether it would pay the damages and use the defendant's right of way for street purposes,—in default of which its right to take and use the property was barred. From this judgment and order plaintiff appeals.—*Affirmed.*

W. A. Nichol and D. M. Anderson for appellant.

T. B. Perry for appellee.

DEEMER, J.—In the year 1878 the appellee constructed what is known as its "South Track" through the city of Albia. It was built in a cut about one hundred and twenty feet wide and thirty feet deep. Appellee's right of way at the point in question is four hundred feet wide. At the time the track was laid, Clinton street, in the city of Albia, which runs north and south, terminated at what is known as "Cousin's Addition," about forty rods north of appellee's right of way. Thereafter, the land through which the railway runs was platted into town lots, streets, and alleys as Cousin's addition, and Clinton street was extended southward across the right of way and on to the southern limits of the city. In April, 1894, the city accepted the dedication of the extension of Clinton street, and requested of the railroad company that it be allowed to

use a strip of ground sixty feet wide and four hundred feet long over its right of way, in order to prolong the street and connect Cousin's addition with the original city. This, appellee refused to do, except on condition that appellant should keep up and maintain the necessary crossing and cattle guards. Appellant brought this action to have the court assess the amount it should pay for the crossing; and make such orders as should secure the strip of land needed for its use, in effectuating the crossing. The trial court instructed the jury that the appellee was not required to construct and maintain a bridge over its right of way, that the law imposed that duty upon the appellant, that appellant was obligated to remove at its own expense all the earth needed to enable it to construct a crossing, and that appellee was entitled to four hundred and twenty dollars, the value of the bridge then standing at the place of crossing, and the further sum of one dollar as damages for the invasion of the strip of ground. It is from this finding and the resulting judgment that the appeal is taken.

Appellant contends that, whenever an incorporated town or city desires to extend one or more of its streets over an existing railway track or right of way, it is incumbent on the railway company to construct
1 the crossing, whether it be at grade, above or under the track; while appellee contends (1) that, as the land included within its right of way was already burdened with a public use, it could not be incumbered by another, except by express legislative enactment, and (2) that the only act of the legislature authorizing such new use or servitude has reference solely to grade crossings, and cannot be so extended as to require of it the construction and maintenance of a viaduct or overhead crossing of its right of way. In the case of *C., M. & St. P. Ry. Co. v. Starkweather*, 97 Iowa, 159, we said "It is not true that property devoted to one public use cannot be subjected to any other. It

is within the power of the general assembly to make the same property subservient to different public uses, or even to take it from one public use and devote it to another." The doctrine is subject to the modification, however, that the power to take the property for the second public use, when such an appropriation would supersede or defeat the first one, must be given expressly or by necessary implication; and stress is placed on that modification, by most of the authorities to which we have referred. Applying this doctrine to the facts of that case, we held that an incorporated town had authority, under Code, sections 464-470, 1270, to condemn a strip across a previously acquired railroad right of way for the purpose of extending and connecting its streets, and concluded by saying: "We are of the opinion that the statutes of this state to which we have referred authorized the opening of the street as proposed. They do not in terms provide for the taking of property already devoted to public uses, but the taking sought by the defendants would not exclude the plaintiff (railroad company) from its property, nor interfere materially with its use, the operation of its trains, and the transaction of its business. The exclusive right to use the railways as such will remain in the plaintiff, and the public will have the right to cross it at proper times and by suitable means." We have it established, 2 then, as a general rule, that an incorporated city or town may lay out and establish streets over the right of way of a railway company to the same extent as it may over other private property; and it follows that the city of Albia had the right to extend and prolong Clinton street as it did.

But the question remains, who is to pay for the viaduct needed to effectuate the crossing? It is no

doubt true, that in the absence of express legislation, a railroad company cannot be required to construct

3 viaducts over its right of way, in order to prolong or connect streets or highways established after the location and acquisition of the right of way. But the legislature may, in the exercise of its police power, exact this duty of these corporations. In recognition of this doctrine our legislature enacted what is known as section 1288 of the Code of 1873, which is as follows: "Every corporation constructing or operating a railway shall make proper cattle guards where the same enters or leaves any improved or fenced land, and construct at all points where such railway crosses any public highway, good, sufficient, and safe crossings and cattle guards, and erect at such points at a sufficient elevation from such highway to admit of free passage of vehicles of every kind, a sign with large and distinct letters placed thereon, to give notice of the proximity of the railway, and warn persons of the necessity of looking out for the cars." Appellee's contention is that the words "good, sufficient, and safe crossings" refer to grade crossings, and that they should not be so extended as to cover overhead crossing or viaducts. It concedes that, if the highway or street had been first established it would have been bound, under other provisions of the law, to erect a bridge at the place where its right of way crossed the highway or street; but it says that, as the right of way was first located and used, it cannot be compelled to build bridges to accommodate the public in the use of highways and streets thereafter established. The case turns, of course, upon the construction to be given section 1288 of the Code, before quoted. It seems to us that this statute has reference to grade crossings. It says that the corporation shall construct, at all points where the railway crosses any public highway, good, sufficient and safe crossings and cattle guards, and erect at such places a sign, to give notice

of the proximity of the railway, and to warn persons of the necessity of looking out for the cars. Grade crossings are the rule in this state, and under or over crossings the exception, and we think this statute was enacted with reference to this rule; for it not only requires the construction of crossings, but also provides that each and every crossing shall be supplied with cattle guards and signs to warn persons of the necessity of looking out for the cars. Now, while a sign might be of some utility at an overhead or under crossing, a cattle guard would not be; yet the corporation is as much bound to erect the cattle guard as it is the crossing. As the one obligation is as imperative as the other, the law should be so construed as to make fulfillment of some use, either to the railway or the traveling public. This can only be done by interpreting the language used as applicable to grade crossings only. Again, the obligation to erect viaducts in such cases, if it exists at all, does not depend upon the order or direction of the municipal authorities, but upon absolute statutory requirement; and, if we give the act the construction contended for by appellant, railway companies may be compelled to erect viaducts over their tracks at every street crossing along the entire length of their right of way through a city, if such bridges are needed to connect the streets under or across which the right of way runs. Manifestly, such was not the legislative intent. A city or incorporated town has the right, as a general rule, to condemn part or parts of the right of way for street or highway purposes, and use the property so condemned for these purposes, provided such use does not destroy or materially impair the franchise or property rights of the company, and, where the crossing is at grade, the company is not entitled to damages for the expense of making the crossing, erecting the cattle guards, or providing the sign. But where the

crossing is over or under the right of way, the damages to be assessed are not controlled by statute, and vest as at common law, and contemplate, as we think, the expense of building the bridge. We may well suppose that the legislature, in passing the statute under consideration, had in mind the conflict of authority in reference to the power of the state to compel the construction of bridges over rights of way in highways which were not in existence at the time of the construction of the railway, and made the act apply simply to grade crossings. The conflict of which we speak is shown by reference to the authorities cited in the learned opinion of Magruder, C. J., in the case of *Chicago & N. W. R'y Co. v. City of Chicago*, 140 Ill. 309 (29 N. E. Rep. 1109); *Kansas Cent. R. Co. v. Jackson County Commissioners*, 45 Kan. 716 (26 Pac. Rep. 394). See, also, *Detroit v. Detroit & H. P. R. Co.*, 43 Mich. 140 (5 N. W. Rep. 275); *Railway Co. v. Hough*, 61 Mich. 507 (28 N. W. Rep. 532); *State v. Chicago, B. & Q. R. Co.*, 29 Neb. 412 (45 N. W. Rep. 469); *State v. District Court* (Minn.) 44 N. W. Rep. 7; *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124; *Old Colony & F. R. Co. v. Plymouth County*, 14 Gray, 155; *Railroad Co. v. Capner*, 49 N. J. Law, 555 (9 Atl. Rep. 781); *Illinois Cent. R. Co. v. City of Bloomington*, 76 Ill. 447.

We are confirmed in our conclusions by the fact that the Twenty-second General Assembly passed an act (chapter 32) granting to cities of the first class, cities acting under special charters, and cities of the
4 second class having a population of seven thousand or over, the power to require railway companies to erect viaducts over or under their tracks, under certain conditions and limitations, among which were that the approaches to the viaduct should not exceed eight hundred feet in length, that no such viaduct should be required on more than every fourth

street running in the same direction, and that no more than one such viaduct should be required in any one year. If, as contended by counsel for appellant, railroads were compelled to erect viaducts over their rights of way before the passage of this act, in virtue of section 1288 of the Code, the legislature did a useless and unnecessary thing in passing the act known as chapter 32, Acts Twenty-second General Assembly. If, before the passage of this last-named act, railways were obliged to build viaducts over their rights of way in order to effectuate a crossing of city streets or public highways, we have this peculiar state of affairs: that in the smaller cities of the state railway companies are required to build viaducts at every street or highway crossing where such viaducts are needed to make a good and sufficient crossing, while in the larger and more populous cities such viaducts cannot be required on more than every fourth street running in the same direction, and the approaches shall not exceed eight hundred feet in length, and no more than one can be required in any one year. Such a construction should not be adopted without plain necessity therefor, and we are not disposed to so interpret the law. We look to chapter 32 of the Acts of the Twenty-second General Assembly, first, to arrive at a proper construction of section 1288 of the Code, and find that the legislature undoubtedly placed the same interpretation upon it that we have given; and, second, we look to it in connection with section 1288, and find that appellant's contention involves such unreasonable and unjust results that we ought not to adopt it. From these conclusions it follows that the trial court was right in holding that it was the duty of the city to erect the bridge at its own expense, or to pay to the railway company as damages the amount required to build the bridge. No claim is made by appellant that the judgment and order of the court does not accomplish these results, and it is AFFIRMED,

A. J. TYLER V. THE CHICAGO & NORTHWESTERN RAIL-
WAY COMPANY, Appellant.

Evidence: VALUE OF GRASS. In an action against a railroad for
1 damages for negligently destroying grass land by fire, statements
of witnesses that the grass land in question was the best in the
county, and tending to show the value of the grass in question,
were admissible, though some of them were based on knowledge of
similar pastures instead of actual knowledge of the grass
destroyed. Though this testimony was, in some respects, objec-
tionable, it was not prejudicial.

SETTING FIRE. The evidence of a witness as to fires other than that
2 in question, but seen near the railway soon after the engine
which is claimed to have set the fire in question had passed, and
that he went to them at once, but did not see any person or thing
which could have caused the fire, except the engine, is admissible.

Appeal: HARMLESS ERROR. The exclusion of the entries in the
4 inspection book in which the condition of railroad locomotives on
5 the days of inspection are noted is not prejudicial in an action
involving the condition of an engine, where the witness who made
them testified positively to the facts in regard to the condition of
the engine, which the entries show.

ESTOPPEL BY CONDUCT. Defendant cannot complain of testimony
8 elicited upon cross-examination of its witness in response to ques-
tions put to him in consequence of questions equally objection-
able, asked by the defendant; especially when it is not prejudicial.

Appeal from Tama District Court.—HON. G. W. BURN-
HAM, Judge.

MONDAY, MAY 31, 1897.

ACTION at law to recover for damages from fires
alleged to have been caused by negligence on the part
of the defendant. There was a trial by jury, and a ver-
dict and judgment for the plaintiff. The defendant
appeals.—*Affirmed.*

Hubbard & Dawley for appellant.

Struble & Stiger for appellee.

ROBINSON, J.—In July, 1894, the defendant operated a railway through a farm in Tama county which was owned by the plaintiff. On the sixteenth day of that month, and again on the twenty-sixth, fires burned over portions of the farm, and injured blue grass and timothy which were growing thereon, and burned part of a fence. The fires started on or near the defendant's right of way, and the plaintiff claims that they were started by locomotive engines of the defendant; that the engines were out of repair, were not supplied with the best-known appliances to prevent the escape of sparks, and were not operated with reasonable care. The answer denies negligence, and avers due care on the part of the defendant.

I. A witness named Fife testified that he was on the plaintiff's grass land July 18; that its condition was good, excepting along the creek, and he thought that from that time it was worth one dollar per acre per month. He also stated that the season was very dry, and that he saw other pastures in that locality about the same time. He was then permitted to state, notwithstanding objections of the defendant, that the plaintiff's pasture was better than any he had seen in that locality, or any other in the year 1894. Amos Brooks, after showing an experience of ten years in farming, stated that he had seen the land in question, but not in the year 1894, and that he had farms in the same locality. He was then asked to state "what grass land, best timothy and blue grass, was worth per acre last year (1894),—good fair pasture land." He answered, over the objection of the defendant, that "it would be worth a dollar per month per acre just for the grazing season, not including the winter

months. I have seen the land in question. It is the best grass land we have in the county." The statement of Fife as to what pastures he had seen was rather indefinite, and the estimate of Brooks as to value was evidently not based upon actual knowledge of the grass which was destroyed, but upon his knowledge of pastures of a similar character. The testimony of the two witnesses together tended to show the value of the grass in question, and, although it was in some respects objectionable, the defendant was not prejudiced by it.

II. The appellant claims that the court erred in permitting one Howdyshell to testify in regard to fires other than those in question claimed to have been set by an engine of the defendants, and claims that there was not sufficient testimony on that point to justify its submission to the jury. The witness testified to having seen fires near the defendant's railway track soon after the engine which is claimed to have set the fires in question passed; that one of the fires he saw was in his own meadow, and that he went to it at once, but did not see any person or thing which could have caused the fire, excepting the engine of the defendant. We think there was sufficient evidence on that point to authorize its submission to the jury.

III. W. T. Haynes, a resident of Tama county, and a farmer, testified for the defendant that the latter part of August, 1894, he placed cattle in a pasture near that in question; that they were in fair condition at that time; and that there was no grass when he took them out. He was asked in regard to their condition when he took them out, but objections to the question and answer were sustained. The condition of the cattle at that time was wholly immaterial, and the answers sought were properly rejected. The witness named was asked by the plaintiff on cross-examination the following: "If the grass upon this ground was of that character and quality that it would make a blaze

that would travel so fast that a person trying to keep up with it would tire out in his attempt to put it out, then what would you say as to the value of the grass?" An objection of the defendant was overruled, and the witness answered, "My opinion would be that it would be worth fifty cents per acre." The witness, on direct examination, had testified on the supposition that the plaintiff's pasture contained two hundred and sixty-one acres; that one hundred head of cattle were pastured in it during the summer; that one hundred and sixty acres of it were burned over about July 26, and the dry grass then burned; and that it would not have been worth more than fifty cents per month more during the remainder of the season if it had not been burned than it was after it was burned. He had also testified: "If, on July 26 this pasture had been very short and entirely dry, not more than an inch or two high, and that when it was set on fire it turned a blaze two or three inches high and run over the ground, that they could follow right along in the rear of the fire, and put it out with shovels, without getting burned, or anything of that kind; if it was seed pasture as here described, I would not give to exceed fifty cents per acre for it." After the witness had testified on cross-examination as stated, he further testified from personal observation that the value of the land would not have been more than fifty cents per acre for the remainder of the season. The question asked on cross examination which we have set out was indefinite, uncertain, and not justified by any issue in the case, but it seems to have been put to the witness in consequence of questions equally objectionable, asked by the defendant, and, in view of other testimony which the witness gave, his answer to that question could not have prejudiced the defendant.

IV. A witness named Lavalley testified that he was stack inspector of the defendant at Boone when the last fire in question occurred; that his duties were

to inspect the ash pans, dampers, front ends, nettings, and stacks of the defendant's locomotive engines; that all engines brought into the house were inspected before they went out, and that the date of each inspection and the condition of the engine inspected, whether in good or bad order, were recorded in the inspection book; that he had the book for July, 1894; that it showed inspections made by himself on the twenty-second and twenty-fifth, and one made by a man named House on the twenty-seventh, of engine No. 712, which is alleged to have set the fire on the twenty-sixth; and that the witness inspected the netting on the twenty-fifth;

4 and that at that time it was in good condition. He was then asked the meaning of the words, "Netting good, stack good, ash pan good," written opposite his name on the twenty-fifth; but an objection of the plaintiff to the question was sustained. The witness testified quite fully in regard to the method of inspecting engines, the life of a netting, and the means by which it was repaired. He also stated that he had inspected the engine in question on the first and third days of August, and found it to be in good condition, and that he made a record of the inspections thus made. He stated further that he had no personal recollection of the inspections, but testified as to them from the entries made in the inspection book, and that the entries were true. House did not testify. The defendant offered in evidence so much of the inspection book as showed the inspection of engine No. 712 on the twenty-second and twenty-fifth days of July, but an objection made thereto by the plaintiff was sustained. An objection to so much of the book as showed the inspection of the engine on the first and third days of August was also sustained. The appellant complains of these rulings.

Records of a character somewhat similar to those in question are sometimes admissible in evidence. Thus, in *Donovan v. Railroad Co.*, 158 Mass. 450 (33 N. E. Rep.

584), a train sheet prepared by employes of the defendant, which showed the movement of its trains, was held competent evidence in its behalf, on the ground that there was no reasonable possibility that it was intentionally made incorrect; that all known circumstances concerning it favored its accuracy; that the sheet was not an accidental memorandum; that it was made by persons acting in the line of their duty, and in the usual course of employment, under conditions which tended to make the entries correct; that the train sheet, the entries, and the messages from which they were made, were acts rather than declarations, done before any controversy had arisen, when all concerned had no interest except to know and state the truth. In *State v. Brady*, 100 Iowa, 191, we held that the records of ticket offices showing the daily sales of railway tickets was admissible in evidence on the trial of a person who was accused of cheating by false pretenses in pretending to have paid charges on account of poor persons, including the purchase for them of railway tickets, which he did not in fact pay. The records thus held to be admissible against the defendant were made by a ticket agent in the ordinary course of business, under conditions and circumstances which tended to preclude error, and to secure entire accuracy of statement. Neither the railway company nor its agent had any interest in the prosecution by the state, and there was nothing in the case to cast any doubt upon the correctness of the reports. In *Huston v. City of Council Bluffs*, 101 Iowa, 33, we held that a record of the United States weather bureau was admissible in evidence, for the reason that it was official, made by a proper person, in the discharge of a duty imposed upon him by law. We held in *Taylor v. Railway Co.*, 80 Iowa, 435, that a record of the inspection of engines like that in question was not competent evidence. Some of the members of

this court, as it is now constituted, are not fully convinced of the correctness of that holding. Therefore

we neither approve nor disprove it, but base our
5 conclusions upon the ground that the witness

Lavalley testified positively to the facts which the entries he had made showed, and the defendant could not have been prejudiced by the exclusion of the entries, if it be true that they were admissible. Nor was it important, for the same reason, to show the meaning of the words used in the entries. That was necessarily included in the testimony which the witness gave.

V. The appellant complains of the refusal of the court to give certain instructions asked, and criticises portions of the charge given. Some of the instructions refused assumed to be true, claims which were in dispute, and others were immaterial. The charge given to the jury fairly submitted the issues involved in the case, and the evidence justified the verdict. The judgment of the district court is **AFFIRMED**.

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
SUPREME COURT
OF
THE STATE OF IOWA
AT
DES MOINES, OCTOBER TERM, A. D. 1897,
AND IN THE FIFTY-FIRST YEAR OF THE STATE.

STATE OF IOWA, Appellant, v. SUEL J. SPAULDING.

Embezzlement: PUBLIC OFFICER. The treasurer of the commis-
1 sioners of pharmacy elected by the commissioners, authorized by
Code, Nineteenth General Assembly, chapter 137, to receive certain
2 license fees, is not a public officer within Code, 1873, section 3908,
making the conversion by a public officer of funds received by
5 virtue of his office an embezzlement, as the power conferred upon
the commissioners to make by-laws and all necessary regulations for
the proper fulfillment of their duties, without expense to the state,
did not authorize them to appoint a treasurer.

STATUTORY RECOGNITION. Laws, Nineteenth General Assembly,
6 chapter 137, providing that certain license fees to be collected by
the pharmacy commission shall be paid to "the treasurer of the
commission of pharmacy," is not a recognition of the treasurer as
a public officer.

SAME. To constitute a public officer within Code, 1873, section 3908,
8 providing that any public officer within the state who converts to

(639)

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126 457

his own use any money that may come into his hands by virtue of his office shall be guilty of embezzlement, the office itself must be created by the constitution or authorized by statute. If authorized by statute its creation may be by direct legislative act, or it may be created by an official board or commission created by the legislature with power to create such an office. His appointment must not only have been made or authorized by the constitution of the state or legislative act, directly or indirectly, but his duties must either be prescribed by the constitution or statutes of the state, or necessarily inhere in and pertain to the administration of the office itself. The duties of the position must embrace the exercise of public powers or trusts; that is, there must be a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public.

SAME. An oath of office, salary or fees, and a fixed term of duration
4 or continuance are, generally, though not necessarily, attached to a public office.

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

TUESDAY, OCTOBER 5, 1897.

THE defendant was indicted and tried for the crime of embezzlement of public money. At the close of the evidence for the state the defendant moved the court to instruct the jury to return a verdict of not guilty. The motion was sustained, and a verdict returned accordingly and the defendant discharged. The state appeals.—*Affirmed.*

Milton Remley, attorney general, *James A. Howe*, county attorney, and *Jesse A. Miller* for the state, appellant.

No appearance for appellee.

KINNE, C. J.—I. Section 3908 of the Code of 1873 provides: "If any state, county, township, school or municipal officer, or officer of any state institution, or other public officer within the state, charged with the collection, safe keeping, transfer or disbursement

public money, fails or refuses to keep in any place
deposit that may be provided by law for keeping
money, * * * or unlawfully converts to his
use in any way whatever, or use by way of invest-
ment in any kind of property * * * or converts
to his own use any money that may come into his
hands by virtue of his office shall be guilty of
1 embezzlement," etc. The indictment is drawn
under this section of the statute, and charges
that the defendant, as a public officer, viz., as treas-
urer of the commissioners of pharmacy for the state
of Iowa, did embezzle and convert to his own use
public money belonging to the state. The only ques-
tion on this appeal is, was the defendant a "public
officer," within the meaning of these words as used in
the statute? If so, then the district court erred in
sustaining the motion. If he was not such "public
officer," the ruling was correct. The commissioners of
pharmacy were appointed under and by virtue of the
provisions of chapter 75, section 3, of the laws of the
Eighteenth General Assembly. That act pro-
2 vided, also, "Said commissioners shall have
power to make by-laws, and all necessary regu-
lations for the proper fulfillment of their duties under
this act, without expense to the state." They were
also authorized to exact and receive certain fees for
registering pharmacists. The act was amended by
chapter 83 of the Acts of the Twenty-first General
Assembly. The commissioners adopted by-laws
which, among other things, provided for the election
of a secretary and treasurer. Thereafter the Nine-
teenth General Assembly (chapter 137) amended the
original act, and provided that certain license fees
should be paid "to the treasurer of the commission of
pharmacy." The foregoing is all of the legislation in
any way bearing upon the question of the selection of
a treasurer for the pharmacy commission. It is without

dispute that the defendant was by the commission elected as its treasurer, and while so acting received a large sum of money belonging to the state, and converted it to his own use. The claim of the state is that he was a "public officer," and as such embezzled the money. The constitution of this state (article 11, section 5) requires that every person elected or appointed to any office shall, before entering upon the duties thereof, take an oath or affirmation to support the constitutions of the United States and of the state, and also an oath of office. The statute prohibits any civil officer from entering on the duties of his office until he has qualified himself by taking such oath and giving a bond. Code 1873, sections 670, 675, 676, 679. It does not appear from the record before us that the defendant ever took such an oath, or in fact any oath whatever. When the commission was created, and at its first meeting, it adopted by-laws providing for the election of a treasurer, but made no provision for his giving bond. Six years thereafter a bond was provided for, and at the time of the conversion of the money for which the defendant is now indicted the by-laws required the treasurer to give a bond to the state in the penalty of five thousand dollars.

II. It may be profitable, in determining the question before us, to refer to some definitions given by courts and text writers as to what in law constitutes a public officer or a public office. "The idea of an officer clearly embraces the idea of tenure, duration, fees, or emoluments, rights and powers, as well as that of duty; a public station or employment confirmed by appointment of government." Burrill, Law Dict. tit. "Office." "A post, the possession of which imposes certain duties upon the possessor, and confers authority for their performance." Century Dict. "A position or appointment entailing certain rights and duties." Cochran, Law Lexicon. "A right to exercise

a public function or employment, and to take the fees or emoluments belonging to it." Bouvier's Law Dict. "A special duty, trust, charge, or position conferred by authority, and for a public purpose; a position of trust or authority, as an executive or judicial office, or a municipal office." Webster Dict. tit. "Office." "'Office' is defined to be a right to exercise a public or private employment, and to take the fees or emoluments thereunto belonging, whether public, as those of magistrates, or private, as of bailiffs, receivers, or the like." Black, Law Dict. tit. "Office"; 2 Blackstone, Comm. 36; *Attorney General v. Barstow*, 4 Wis. 567. "A public officer is said to be an officer under the government, as distinguished from an officer of a corporation, or from a private person holding what is sometimes called an office, such as an executor or guardian." Abbott, Law Dict. tit. "Public Officer." "Offices consist of a right, and correspondent duty, to execute a public or private trust, and to take the emoluments belonging to it." 3 Kent, Comm. 454. "An office, such as to properly come within legitimate scope of an information in the nature of a *quo warranto*, may be defined as a public position, to which a portion of the sovereignty of a country, either legislative, executive, or judicial, attaches for the time being, and which is exercised for the benefit of the public." High, Extr. Rem., section 625. "A public office is the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law, or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer." Mechem, Pub. Off., section 1. "A public office is an agency for the state, and the person whose duty it is to perform the agency is a public officer." 19 Am. & Eng.

Enc. Law, 382. "An office is a public station or employment conferred by the appointment of government. The term embraces his term of tenure, duration, emoluments, and duties." *U. S. v. Hartwell*, 6 Wall. 393; Throop, Pub. Off., sections 2-10, inclusive; *Brown v. Russell* (Mass.) 43 N. E. Rep. 1005, and cases cited. "An employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental." *In re Oaths Taken by Attorneys and Counselors*, 20 Johns. 493. "An office is a public charge or employment, and the term seems to comprehend any charge or employment in which the public are interested." Every office is considered public, the duties of which concern the public. *People v. Hayes*, 7 How. Prac. 248; *People v. Bedell*, 2 Hill, 196. "An office is a public charge or employment. A public officer is one who has some duty to perform concerning the public." *Hill v. Boyland*, 40 Miss. 625. "The true test of a public office seems to be that it is a parcel of the administration of government, * * * or is itself created directly by the law-making power." *Eliason v. Coleman*, 86 N. C. 241. "An office is a special trust or charge created by competent authority." Judge Cooley in *People v. Langdon*, 40 Mich. 673. "All persons who by the authority of law are intrusted with the receipt of public moneys, through whose hands money due to the public, or belonging to it, passes on its way to the public treasury, must be so considered [as public officers], by whatever name or title they may be designated in the law authorizing their appointment, and whether the service be special or general, transient or permanent." *Commonwealth v. Evans*, 74 Pa. St. 124. "The term 'officer' in its common acceptation, is sufficiently comprehensive to include all persons in any public station or employment conferred by the government." *Vaughn v. English*, 8 Cal. 41. "A civil office is a grant and

possession of the sovereign power, and the exercise of such power within the limits prescribed by the law which creates the office constitutes the discharge of the duties of the office." *State v. Valle*, 41 Mo. 29. " 'Public office,' as used in the constitution, has respect to a permanent trust to be exercised in behalf of the government, or of all citizens who may need the intervention of a public functionary or officer, and in all matters within the range of the duties pertaining to the character of the trust." *In re Hathaway*, 71 N. Y. 238. "Whoever has a public charge or employment affecting the public is said to hold or to be in office." *Rowland v. Mayor, etc.*, 83 N. Y. 376. "The word 'officium' principally implies a duty, and, in the next place, the charge of such duty; and it is a rule that where one man hath to do with another man's affairs against his will, and without his leave, that is an officer. Every man is a public officer who hath any duty concerning the public and he is not the less a public officer when his authority is confined to narrow limits because it is the duty and nature of that duty which make him a public officer, and not the extent of his authority." Carth. History of a Law Suit, 478; *Bunn v. People*, 45 Ill. 397; *State v. Wilson*, 29 Ohio St. 348. "Where an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public, assigned to him by law, he must be regarded a public officer." *Bradford v. Justices, etc.*, 33 Ga. 336. The legal meaning of the word "office" always implies a charge or trust conferred by public authority, and for a public purpose. *In re Dorsey*, 7 Port. 371. "An office is simply an appointment or authority on behalf of the government to perform certain duties, usually at and for a certain compensation." *Smith v. City of N. Y.* 37 N. Y. 520. "Offices consist in the right, and corresponding duty, to execute a public or private trust,

and to take the emoluments belonging to it." *State v. Wilson*, 29 Ohio St. 348. "When an employment or duty is a continuing one, which is defined by rules prescribed by law, and not by contract, such an employment is an office, and the person who performs it is an officer." *Shelby v. Alcorn*, 36 Miss. 273. "Where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office." *State v. Brennan* (Ohio) 29 N. E. Rep. 593; *State v. Hocker* (Fla.) 22 South. Rep. 721. "An office in a municipal corporation is a public function established by law." *Kennedy v. Independent School District*, 48 Iowa, 191. "It is difficult to determine in all cases who is to be deemed a public officer. If the office is one involving the taking of an oath and the filing of a bond by the occupant, whether he be elective or not, such occupant is a public officer." 1 McClain, Cr. Law, section 646. We have found, upon a full investigation of all the authorities cited, and many others, that courts have not been entirely consistent or harmonious in their holdings as to the facts which must exist, and be made to appear, in any given case, in order to show that one is a public officer, and that the place filled is a public office. Doubtless the variance in the rules laid down is largely due to the statutes in force in the several jurisdictions wherein the cases were decided; to the powers conferred by such statutes, and the duties enjoined thereby. So, much force has been given to the fact that the power of appointment has come from the state, or that the authority to appoint is expressly given by law. *State v. Bus* (Mo. Sup.)

36 S. W. Rep. 636; *State v. Brennan* (49 Ohio St. 33) 29 N. E. Rep. 593, *Eliason v. Coleman*, 86 N. C. 241; *Commonwealth v. Evans*, 74 Pa. St. 124; *Shelby v. Alcorn*, 36 Miss. 273. Another fact which is thought to be of importance in determining whether one is a public officer is as to whether the duties of his position are devolved upon him by a superior, or by the statute itself. *State v. Brennan* (Ohio) 29 N. E. Rep. 593; *Bradford v. Justices, etc.*, 33 Ga. 336; *Brown v. Russell* (Mass.) 43 N. E. Rep. 1005; *People v. Nostrand*, 46 N. Y. 381; *U. S. v. Hartwell*, 6 Wall. 385.

From all the authorities, we think the following rules may properly be laid down for determining whether one is a public officer within the contemplation of our statute, relating to embezzlement of
3 such officers (Code, 1873), section 3908. (1) The office itself must be created by the constitution of the state, or authorized by statute. (2) If authorized by statute, its creation may be by direct legislative act; or the law making power, when not inhibited by the constitution or public policy from so doing, may confer the power of creating an office upon official boards or commissions which are themselves created by the legislature, when such office is necessary to the due and proper exercise of the powers conferred upon them, and the rightful discharge of duties enjoined. (3) A position so created by the constitution, or by direct act of the legislature, or by a board of commissions duly authorized so to do, in a proper case, by the legislature, is a public office. (4) To constitute one a public officer, at least within the purview of the criminal law, so that he may be liable for the misappropriation of the public funds, his appointment must not only have been made or authorized as above stated, but his duties must either be prescribed by the constitution or the statutes of the state, or necessarily inhere in and pertain to

the administration of the office itself. (5) In any event, the duties of the position must embrace the exercise of public powers or trusts; that is, there must be a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public. (6) The following, among other requirements, are usually, though not necessarily attached to a public office: (a) An oath of office; (b) salary or fees; (c) a fixed term of duration or continuance.

Other rules might be stated, but these will suffice for the purposes of the case before us. In the light of the above rules, which are, as we believe, sustained by the great weight of authority, can the defendant be said to be a public officer? It is to be observed that no such office as treasurer of the commission was created by either the constitution or by act of the legislature. Nowhere in the original act creating the commission of pharmacy, or in the amendments thereto, is any such office created; nor is there any authority conferred upon said commission to create or establish such an office, or any office whatsoever.

In the act creating the commission it is provided: "Said commissioners shall have power to make by-laws and all necessary regulations for the proper fulfillment of their duties under this act, without expense to the state." Now, the power thus conferred did not involve the right to create a public office or to appoint persons to places, who should be deemed public officers. Conceding that the legislature had the power to create the office of treasurer of this commission, it has at no time undertaken so to do. In the absence of legislative authority, the board could not create a public office. Nor does it appear that there was any intent on the part of the legislature to confer any such power on the commission. Furthermore, so far as the acts relating to the

commission are concerned, with an exception to be hereafter noticed, it might well be held that the legislature intended that the commissioners themselves should perform the duties of collecting the funds arising from the performance of the duties
6 enjoined upon them, and of disbursing the same. The Nineteenth General Assembly (chapter 137) provided, among other things, that certain license fees to be collected by the commission should be paid to "the treasurer of the commission of pharmacy."

It is said that, even though there was no authority originally in the commission to create the office of treasurer, still the above provision was a recognition of the fact that there was such an office. We cannot so consider it. Here we have a position created without authority of the legislature, which alone could authorize its creation. The lawmaking power never prescribed any duties, nor authorized any one else to prescribe them, for such an officer. No part of the sovereign functions of government was ever delegated by the legislature to the individual who might fill such place, and none of the usual requisites of an office were provided for by the legislature. But the controlling facts are that this treasurer was a creation of the commission, without authority of law, and presumably for their own convenience, and at all times subject absolutely to their control. They not only created the office, but they fixed its tenure, and the compensation to be paid the occupant. They might allow him to act, as they did, without taking an oath of office; and, being a creation of their own, they could require him to give bonds, or not, as they pleased. Having created the place and appointed the incumbent, they could at any time dispense with his services, and abolish the so-called office. Such a one is not a public officer. Judge Cooley in *People v. Langdon*, 40

Mich. 673, in speaking of what will constitute a public officer says: "The officer is distinguished from the employe in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account, as a public offender, for misfeasance or nonfeasance in office; and usually, though not necessarily, in the tenure of his position." In the case at bar, the duties performed by the defendant do not indicate an office, rather than an employment. He was, as we have shown, entirely dependent for his place upon the will or caprice of the commission. The duties imposed upon him were not the result of the law, but the will of his superiors, the commission. He was the creation of it, to do its will, having no independent functions. Duration or continuance is embraced in the term "office," and a position temporary in its character, and which may end at the will of a superior, is not ordinarily to be considered an office. Mechem, Pub. Off. section 8. The same writer, in speaking of deputies appointed by public officers, says that whether they are to be considered as public officers depends upon the circumstances and method of their appointment. When such appointment is provided for or required by law, which fixes their powers and duties, and they are required to take an oath and to give bonds, they are usually considered public officers; but where a deputy is appointed, merely at the will and pleasure of his principal, to serve some purpose of the latter, he is not a public officer, but a mere servant or agent. Mechem, section 38. So a "position the duties of which are undefined, and which can be changed at the will of the superior, * * * is not an office, but a mere employment, and the incumbent is not an officer, but a mere employe." 19 Am. & Eng. Enc. Law, pp. 387, 388, and cases cited,

The defendant, then, not being a public officer of the state, could not be convicted of the crime of embezzlement, under the indictment in this case, and the lower court properly directed a verdict for him.—
AFFIRMED.

STATE OF IOWA V. FRANK WATSON, Appellant.

Evidence: **REBUTTAL:** *Impeachment.* Testimony that defendant, 7 charged with burglary, was seen on the day of the burglary at a 8 certain place is admissible to impeach his testimony that he was never in such place, and also in rebuttal of his claim that he was in another place at or about the time the crime was committed.

SAME. As the burden of proving an alibi is on the defendant, evidence in support thereof may be rebutted.

CROSS-EXAMINATION. The court may, in its discretion, permit the 6 county attorney to cross-examine the defendant, charged with burglary, who takes the stand in his own behalf, at considerable length with reference to his various places of residence, his going under assumed names, and his whereabouts at particular times.

IMPEACHMENT. A witness cannot be impeached by evidence of contradictory statements made out of court unless his attention is called to such statements on his examination.

OWNERSHIP. Proof of occupancy of a building is sufficient to establish an allegation of ownership, in an indictment for burglary.

CONFLICT. Where the evidence as to an alibi was conflicting, the truth of that defense was for the jury.

Indictment. An indictment for burglary charging that the building 10 broken and entered was the office of a certain "company" need not state whether the company is a corporation or partnership.

SAME. An indictment charging defendant with breaking and entering a building with the intent to commit a robbery need not set out the elements of the intended robbery.

SAME: *Burglary.* An allegation in an indictment for burglary that 2 the building burglarized was the office of a certain railroad company was sustained by proof that the building, though not owned 4 by the company was occupied by it, since Code, 1873, section 4302, provides that an erroneous allegation with reference to ownership is not fatal.

Alibi: **INSTRUCTION.** An instruction cautioning the jury in a criminal trial that an alibi is easily manufactured and the testimony

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105	173
102	651
109	438
102	651
117	229
102	651
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concerning the same should be carefully considered, is not erroneous.

New Trial: NEWLY DISCOVERED EVIDENCE. Newly discovered evidence is not a ground for new trial in a criminal case in Iowa.

Appeal: MISCONDUCT: *Record.* Remarks of the trial judge cannot be presented to the supreme court, on appeal, by an affidavit of counsel not made a part of the record by bill of exceptions or otherwise.

Jury Question. A criminal case must be submitted to the jury where there is conflicting evidence as to all the facts essential to conviction

Appeal from Jefferson District Court.—HON. FRANK W. EICHELBERGER, Judge.

TUESDAY, OCTOBER 5, 1897.

THE defendant was indicted, tried, and convicted of the crime of burglary, and appeals from the sentence imposed.—*Affirmed.*

W. G. Ross for appellant.

Milton Remley, attorney general, and Jesse A. Miller for the state.

DEEMER, J.—About 1:30 o'clock in the morning of the twenty-second day of November, 1895, two persons broke and entered the depot of the Chicago, Burlington & Quincy Railway Company in the town of Fairfield, Iowa, and robbed two men who were in the ticket office. Defendant was arrested, and, upon trial, convicted of being one of the guilty parties. His main defense was an alibi, and he produced witnesses who testified that he was in the city of Moberly, in the state of Missouri, on the twenty-first and twenty-second days of November, 1895. The jury evidently discredited this testimony, for the trial resulted in a verdict of guilty. The main contention

now is that the verdict lacks support, and is contrary to the weight of the evidence adduced on the issue of the whereabouts of the defendant during the night the crime was committed. The men who were robbed both gave it as their opinion that defendant is one of the men who perpetrated the offense. In addition to this, another witness testified to having seen him in the vicinity of Fairfield early in the morning of the twenty-second of November. Other witnesses testify that they saw defendant at the city of Washington, in this state, on the twenty-second. Now, while it is true that many of defendant's witnesses testified that they saw him at Moberly at a time when it would have been quite impossible for him to have left there and arrived at Fairfield in time to have taken part in the burglary, yet few, if any, of them, are certain of having seen him later than 2:45 in the afternoon of the twenty-first, nor are any of them very positive of having seen him on the morning of the twenty-second. Defendant could have left Moberly at 2:45 P. M., November 21, and arrived at Fairfield in time to have had a part in the crime. The conflict in the evidence required the submission of the case to a jury, and with its conclusion we cannot interfere.

II. The indictment charges that the building broken and entered was "the office of the Chicago, Burlington & Quincy Railroad Company, situated at Fairfield, in Jefferson county." The proof shows that it was the depot in which was located the ticket office of the Chicago, Burlington & Quincy Railroad Company, and that one of the occupants of the building which was located in Fairfield was the night
2 telegraph operator for that company. True, there is no evidence that the company is incorporated, nor is there any proof of its ownership of the building. But this is not required. Proof of occupancy is sufficient to establish an allegation of

ownership. *State v. Rivers*, 68 Iowa, 611; *State v. Teeter*, 69 Iowa, 717. And it is not necessary to
3 prove the exact status of the owner. *State v. Semotan*, 85 Iowa, 57; *State v. Franks*, 64 Iowa, 39; *State v. Emmons*, 72 Iowa, 265; *State v. Jelinek*, 95 Iowa, 420. Under our statute (Code 1873, section
4 4302) an erroneous allegation with reference to ownership is not fatal, if the crime is described in other respects with sufficient certainty.

III. Defendant offered to prove that shortly after the commission of the crime one of the witnesses for the state, who was one of the persons robbed, gave or assented to a description of the offenders which did
5 not correspond with the one given on the trial, and did not in fact characterize the defendant.

This evidence was purely impeaching, and, as no proper foundation was laid, was properly rejected. In other words, the witness was not allowed to say whether or not he made any such contradictory statements. If proper foundation had been laid, still the ruling was not erroneous, for the reason that the questions propounded to the witness called for impeaching purposes were not in proper form.

IV. The county attorney was allowed to cross-examine the defendant, who was a witness in his own behalf, with reference to his various places of residence, his going under assumed names, and
6 his whereabouts at particular times, at considerable length. This examination was perfectly proper, and the court did not abuse the discretion vested in it in such matters.

V. During the course of the cross-examination defendant testified that he was never at Washington, Iowa. In rebuttal, the state was permitted to show that he was there on or about the twenty-second day of November, 1895. Complaint is made of this.

We think the ruling was correct. Testimony to the effect that he was at Washington, Iowa, on the
7 twenty-second of November, was not only properly admitted for impeaching purposes, but it was also admissible in rebuttal of defendant's claim that he was in Moberly at or about the time the
8 crime was committed. Under the rule adopted by this court, the burden was upon defendant to establish the alibi, and the state had the right to rebut any showing the defendant made as to his whereabouts at or near the time the crime was committed.

VI. The seventh instruction is complained of. It is almost identical with the one approved in the case of *State v. Blunt*, 59 Iowa, 468, and needs no further consideration.

VII. The indictment charges that defendant broke and entered the building "with the intent then and there to commit a public offense, to-wit, robbery."

It is said that the elements of the intended
9 crime are not set out with sufficient detail. This contention is fully met by the case of *State v. Jennings*, 79 Iowa, 513, where we approved an indictment containing almost the exact language as the one at bar. See, also, *State v. Jones*, 10 Iowa, 206.

VIII. The indictment does not state what the Chicago, Burlington & Quincy Railroad Company is. This is not necessary. See authorities cited in the second division of this opinion, and *People v. Henry*, 77 Cal. 445 (19 Pac. Rep. 830); *State v. Shields*, 89 Mo. 259 (1 S. W. Rep. 336); *Norton v. State*, 74 Ind. 337.

IX. Certain remarks said to have been made by the judge are complained of. These alleged statements are attempted to be shown by affidavit of
11 counsel, which was not made part of the record by bill of exceptions or otherwise. We have frequently held that such matters cannot be made

of record in this manner. *State v. Bigelow*, 101 Iowa, 430; *State v. Le Grange*, 99 Iowa, 10.

X. One of the grounds of the motion for a new trial was newly-discovered evidence. That such is not a cause for new trial, see *State v. Cater*, 100 Iowa, 501;

State v. King, 97 Iowa, 440. If it were, the 12 showing here is not sufficient. There is no affi-

davit from the witness whose evidence is the basis for the new trial, and no reason is given why it is not produced. *Warren v. State*, 1 G. Greene, 106.

We have examined the whole record with care, and discover no prejudicial error.—AFFIRMED.

STATE OF IOWA V. BETSY SMITH, Appellant.

Murder by Poison. An instruction to find the defendant in a murder 8 trial guilty, if the jury find from the evidence, beyond a reasonable doubt, that she gave or was a party to the giving of a deadly poison to the deceased, of which he died, without requiring them to find that the poison was given feloniously, is erroneous.

Accomplice. Under Code, 1873, section 4559, providing that the cor- 7 roborations of an accomplice is not sufficient, "if it merely shows the commission of the offense or the circumstances thereof," a charge that "the corroboration is not sufficient if it merely shows that the offense has been committed by some person" was insufficient in omitting reference to "the circumstances."

DEGREE OF EVIDENCE REQUIRED. A preponderance of evidence 6 showing that a witness for the state was an accomplice of defendant, is sufficient to require her corroboration by other evidence tending to connect defendant with the crime charged, before he can be convicted. That she was an accomplice, need not be shown beyond a reasonable doubt.

Motive: CIRCUMSTANTIAL EVIDENCE. If an act or a declaration of 4 an accused occurring prior to the commission of the crime is admissible on the question of motive, it may be shown by circumstantial evidence.

RELEVANCY. The state sought to show that defendant charged with 5 poisoning her husband was connected with a shooting of the husband which occurred before he died of poison. There was a trial as to the shooting at which the husband testified for the state.

102	656
103	50
102	656
104	725
102	656
1107	481
102	656
112	200
102	656
1115	120
102	656
124	212
102	656
129	234

identifying another than his wife as his assailant. *Held*, this evidence of the dead husband might be introduced by the wife, on her trial for poisoning.

Included Offenses: INSTRUCTIONS. Since Code, 1873, section 8849, provides that all murder perpetrated by means of poison is murder in the first degree, a defendant charged with poisoning is guilty of that offense, or of nothing; and consequently it is not necessary, on his trial, to charge in regard to different degrees.

Separation of Jurors. Under Code, 1873, section 4484, providing that the jurors in a criminal case may be permitted to separate "except where one of the parties objects thereto," it is error, in a case tried on indictment, to permit a separation over defendant's objection.

Appeal: BILL OF EXCEPTIONS. The action of the trial court respecting the separation of the jury in a criminal trial, as shown by the stenographer's notes, is before the supreme court on appeal, where the bill of exceptions states that the short-hand notes contain not merely the evidence and rulings thereon, but the proceedings on the trial, and that the ruling of the court and the exceptions of the defendant are as stated in the notes, and the certificate of the judge attached to the short-hand report, making it a part of the record, states that it contains all the objections and rulings made and exceptions taken, notwithstanding that the bill of exceptions in reciting what is made a part of the record refers to the notes of the evidence and the translation thereof when made, and not to rulings and proceedings not included in the evidence.

Appeal from Polk District Court.—HON. S. F. BALLIET,
Judge.

TUESDAY, OCTOBER 5, 1897.

THE defendant was accused of the crime of murder in the first degree, was tried by jury, found guilty, and adjudged to be imprisoned in the state penitentiary at Anamosa during the term of her natural life. From that judgment she appeals.—*Reversed*.

F. B. Huckstep and Dale, Kinkead & Bissel for appellant.

Milton Remley, attorney general, *Jesse A. Miller*, and *James A. Howe* for the state.

ROBINSON, J.—The indictment charges that on the twenty-fourth day of April, 1894, the defendant committed the crime of murder in the first degree, by wilfully, and with premeditation and malice aforethought, administering to Michael Smith a deadly poison, which caused his death on the next day. Michael Smith was the husband of the defendant. About one year preceding his death, after he had retired for the night, and while alone with the defendant in his bedroom, he received a gunshot wound, which made him wholly blind. The wound appeared to have been made by a bullet, which entered his head just back of the left eye, and passed through the head, making its exit in the right temple, just back of the right eye. The optic nerves were destroyed, but the brain was not injured. At that time Smith held a certificate of membership issued by the Locomotive Engineers' Mutual Life Insurance Association, which provided for the payment of the sum of three thousand dollars in case of the total and permanent loss of eyesight after the expiration of one year from the commencement of such disability, and we infer, from a meager statement in the record, that a like sum would have been payable at his death, without preceding blindness. The defendant was named as the beneficiary of the certificate in case payments or benefits should accrue or become due to his heirs. The year of total blindness had expired, and measures for the collection of the amount of the certificate were being taken, but it had not been received, when Smith died. There is evidence which tends to show that several attempts to poison Smith had been made within a short time preceding his death, and that poison was administered to him two or more times on the day and in the evening before he died. The direct testimony connecting the defendant with the poisoning

was given by Mrs. Ida E. Scoville, a sister of the defendant, who had been living with her several months at the time of Smith's death. She testified that, for several months preceding that time, the defendant had been paying attention to one of her roomers, a saloon keeper, named Frank Bellaire; that she spent much of her time, both day and night, in his company, furnished him money with which to start a saloon, and purchased articles of clothing for him; that the money used for those purposes was from the savings of Smith; that the defendant and Bellaire habitually occupied the same room and bed at night; and that the defendant had talked about the money which was to be paid on Smith's certificate, and, about two month's before Smith's death, had said that, when she obtained the money, she intended to leave with Bellaire. Other witnesses also testified to the defendant's fondness for Bellaire, and that they were frequently out together at night. Mrs. Scoville testified further as to threats made by the defendant against the life of her husband, and that she treated him brutally; that about two weeks before Smith's death she said that she had given him a dose; that the witness was present at the time, and saw her place seventeen or eighteen small pills in a piece of lemon pie which Smith ate; that he complained that the pie was bitter, and would have left a part of it, but the defendant fed it to him; that she told the witness not to call a physician if he became sick, and left the house; that the next morning the defendant prepared breakfast, although not accustomed to do so; that oat meal was served, and that the defendant stated she had placed morphine in the portion which Smith ate; that in the afternoon of the day preceding Smith's death, she gave him something without telling the witness what it was, but told her if Smith became sick not to send for a physician, and then left the house with Bellaire;

that she did not return until about 11 o'clock that night, and that, at that time, she and Bellaire were intoxicated; that about midnight she filled a capsule from the contents of a box of "rough on rats," a preparation of which from seventy to ninety-five per cent. is shown to be arsenic, and gave it to Smith; that he had been sick since 7 o'clock that evening, and was in so serious a condition that several persons who came in during the evening advised sending for a physician; that, after the defendant's return, Bellaire started for a physician; that when the defendant learned of the fact, she sent for him to return, and herself followed, and overtook him, and induced him to return to the house; and that no physician was called until the next morning, after Smith had become unconscious, and but a short time before his death, which occurred at 9 o'clock. Mrs. Scoville's testimony respecting the sickness and death of Smith, and the defendant's conduct after her return in the evening, excepting as to the administering of the capsule, is corroborated by other witnesses. A post mortem examination was made, which showed that Smith's death was caused by arsenical poisoning. It appears to be the theory of the defendant that the poison was administered by Mrs. Scoville, and some evidence designed to show that such was the case was offered.

I. The appellant first complains that the district court refused to require the jurors to be kept together in charge of a proper officer during the trial, although requested to do so by the defendant, but permitted them to separate, although she did not consent, but objected to the separation. The abstract of the appellant appears to sustain her claim in regard to this matter, but is denied by the state, which claims that the record does not show what was done, if anything, respecting the separation of the

jury. This claim is based upon the following facts: The trial in the district court commenced on the fourteenth and ended on the thirtieth day of June, 1894. A bill of exceptions was signed by the trial judge, and filed, which contains the following: "That afterwards the trial of said cause was commenced, and all of the evidence offered, introduced, or used by each and all of the parties was taken down in shorthand by the said C. F. Irish, official reporter of said court, and all exhibits and documentary evidence offered, introduced or used on said trial were identified and referred to in said shorthand notes, which contain all the evidence offered, introduced or used, and proceedings had and done, on the trial of said case; that the offers of evidence, questions asked, objections made, rulings of the court, and exceptions by defendant to such rulings, are as stated and shown in said shorthand notes of the evidence, and are each and all correctly stated therein. Said shorthand notes of the evidence are entitled in the case, and were duly filed in said court and cause on the twenty-sixth day of June, 1894; and such shorthand notes of the evidence, together with the translation thereof, when duly made and certified to by said official shorthand reporter, are hereby made a part of this bill of exceptions, and a part of the record in this case." The trial judge had, on the twenty-third day of June, attached to the shorthand notes a certificate, which contained the following: "I hereby certify that the foregoing is the official report of the above-entitled case; that it contains, together with the documentary evidence therein referred to, all of the evidence that was offered or introduced on the trial of said case, and all of the objections and rulings made and exceptions taken, and the said official report in shorthand is hereby made part of the record in the above-entitled cause." The shorthand notes were not certified by the shorthand reporter, but he certified

his translation of the notes. It is claimed in behalf of the state, that the statement of the bill of exceptions we have set out, with the shorthand report of the trial, and the certificate of the trial judge, was not sufficient to make of record the proceedings in regard to the separation of the jury. We do not think

2 this claim is well-founded. The bill of exceptions expressly states that the shorthand notes contained, not merely the evidence and rulings thereon, but the proceedings had and done on the trial, and that the rulings of the court and exceptions by the defendant were as stated in the notes. It is true the bill of exceptions, in reciting what is made a part of the record, refers to the notes of the evidence and the translation thereof when made, and not to rulings and proceedings not included in the evidence; but the bill of exceptions does not show any intention to exclude from the record evidence of such rulings and proceedings; and the certificate of the judge to the shorthand report made it a part of the record. We have no doubt that it was the intent of the judge to make the matter in question a part of the record, and that he accomplished what he intended. In reaching this conclusion, we do not give any weight to a certificate of the judge, which appears to have been signed on the twenty-third day of June, 1894, and attached by the shorthand reporter to the translation of his notes, more than a year later.

II. The record shows that at noon of the first day of the trial the defendant asked the court to place the jurors in the custody of a special bailiff, and to require them not to separate until a verdict was

3 reached. The court thereupon placed the jurors in charge of a bailiff who was directed not to allow them to separate. At the close of the day, however, the court discontinued the order made at noon, and refused the request of the defendant that

the jurors be not allowed to separate during the trial, to which the defendant excepted. Thereafter they were allowed to separate at each adjournment of court. Section 4434 of the Code of 1873 is as follows: "The jurors sworn to try an indictment may at any time before the final submission of the cause to them, in the discretion of the court, be permitted to separate, except where one of the parties object thereto, or be kept together in charge of proper officers. The officers must be sworn to keep the jury together during the adjournment of the court, and to suffer no person to speak to or communicate with them on any subject connected with the trial, nor do so themselves, and to return them into court at the time to which it adjourns." That section was considered by this court in the late case of *State v. Garrity*, 98 Iowa, 101, and held to require that jurors, in cases to which it applies, be kept together during the trial, in the charge of proper officers, and not be permitted to separate if either the state or the defendant object to a separation. This case is triable on indictment, and is within the purview of the section quoted. It follows that the district court erred in refusing the request of the defendant, and in permitting the jurors to separate.

III. The appellant complains that the state was permitted to show circumstances attending the shooting of Smith, in April, 1893. The purpose for which evidence of that character was received, was to show that the defendant was unlawfully connected with the shooting, and thus, that she entertained a desire or purpose to take the life of Smith, as bearing upon the question of her guilt of the crime charged in this case. For that purpose, the evidence was competent. The appellant does not deny, but admits, that acts, conduct, threats, declarations, and statements of a person accused of crime, which

occurred before it was committed, are admissible to show a motive or intent, but urges that, to be competent, the evidence must be direct, and not circumstantial. We are not aware that the authorities make the distinction urged, and do not think there is any sufficient ground upon which to base it. If a prior act or declaration may be proved as tending to show the guilt of a person accused of crime, we are of the opinion that it may be shown by any evidence competent to prove the act if it were directly in issue, whether such evidence be positive and direct, or circumstantial only.

IV. It appears that after the shooting of Smith, in the year 1893, a man named Talbott was accused of the crime, and had a preliminary examination before a justice of the peace, at which Smith testified. The defendant sought to show by several witnesses what Smith's testimony on that hearing was, but, on the objection of the state, their testimony was excluded. It is not shown what it would have proved had it been admitted, but we infer from the questions asked, that the defendant expected it to prove that Smith identified a person other than the defendant as
5 the one who did the shooting. The state contends that his testimony was not admissible, because it was not given in an action between the same parties, in regard to the same subject-matter. No authorities are cited for the state in support of its claim. The objection of the state, that the rejected testimony did not relate to the subject-matter involved in this case, is not well taken, for the state, by the evidence which it introduced, made the shooting an issue in the case, and that was the matter concerning which Smith testified. It was said in *State v. O'Brien*, 81 Iowa, 90, to be "well settled that a person who heard and recollects the testimony of a deceased person, may testify in regard to it," and that the rule is applicable

in criminal cases. But does that rule apply to cases in which one of the parties was not a party to the proceedings in which the testimony of the deceased witness was given, and where the person who was not a party to that proceeding desires to use the testimony against another who was a party thereto? None of the authorities cited by appellant refer to a case of that kind. The admissibility of the testimony of a deceased witness depends in large measure upon the right and opportunity which the person against whom it is sought to be used, had to appear in the proceeding in which it was given, and cross-examine the witness. *Harrison v. Charton*, 42 Iowa, 572; 1 Greenleaf, Ev. section 164. If that right existed and was exercised, the evidence is ordinarily admissible against the party who exercised it. In the preliminary examination in question the state was a party, and, as we understand the record, Smith was its witness. If that was the case, the state not only had the opportunity to examine him, but, in a sense, vouched for his credibility and the truth of his statements. We are of the opinion that, under these circumstances, his testimony was competent evidence in this case against the state, and, if we are right in our inferences as to facts, that the court erred in rejecting proof of it. For the reason that the arguments on this point are not satisfactory, and that we do not understand that the question is necessarily involved in the case, we refrain from expressing an opinion as to the admissibility of the testimony of Smith if it was in fact offered by Talbott.

V. The court charged the jury that, if it found from the evidence, "beyond a reasonable doubt," that Mrs. Scoville was an accomplice in causing the death of Smith, the defendant could not be convicted
6 upon her testimony alone, but that it must be corroborated by other evidence which would tend to connect the defendant with the crime charged.

The effect of that portion of the charge was to instruct the jury that, unless Mrs. Scoville was shown, beyond a reasonable doubt, to be an accomplice in the murder of Smith, her testimony need not be corroborated. In that the court erred. It was only necessary to show that she was an accomplice by a preponderance of the evidence. See *State v. Sipult*, 81 Iowa, 41, and cases therein cited.

VI. Section 4559 of the code of 1873 provides that "a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof." The court charged the jury that "the corroboration is not sufficient if it merely shows that the offense has been committed by some person," and omitted all reference to "the circumstances" of the offense. The omission was erroneous.

VII. The ninth paragraph of the charge authorized the jury to find the defendant guilty if it found from the evidence, beyond a reasonable doubt, that she "gave or was a party to the giving of a deadly poison to Michael Smith, of which he died," without requiring the jury to find that the poison was given feloniously, and in that respect it was erroneous.

VIII. The court charged the jury only with respect to the crime of murder in the first degree, and the appellant complains that it did not instruct the jury with respect to the lower degrees of homicide.

9 Section 3849 of the Code of 1873 provides that "all murder which is perpetrated by means of poison * * * is murder in the first degree." The defendant was guilty of that offense, or was not guilty of any of which she could be convicted in this action.

State v. Wells, 61 Iowa, 632. Therefore it was not necessary for the court to instruct the jury in regard to any degree of homicide excepting that charged in the indictment. *State v. Cater*, 100 Iowa, 501, and cases therein cited.

IX. What we have said disposes of all the material questions likely to arise on another trial. For the errors pointed out, the judgment of the district court is ~~REVERSED~~.

GEORGE P. HANAWALT V. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Appellant.

Evidence: CONTRACTS. A medical examiner appointed by a life insurance company under an agreement by the company to pay him a specified amount for each applicant examined, is not affected by a provision in a subsequent contract between the company and its general agent, requiring the latter to pay for all medical examinations out of a certain per cent. of the first year's premiums allowed him for that purpose, nor by the fact that the agent, after the services were rendered, furnished the company with a memorandum of unpaid bills which did not include one for medical examinations, nor by a settlement between the company and its agent by which the latter agreed to pay the bills for medical examinations; and evidence of such matters is inadmissible against him in an action against the company to recover for his services, where he was not aware of such provision or of the transactions between the company and its agent.

SAME: Estoppel. Declarations of a general agent of an insurance company to a medical examiner that the company desired him to hold his bill for examination fees until the finances improved, made in connection with his statement that the only way the examiner could get the money for present use was to accept the agent's note and indorse it in blank until the collections came in, are admissible, irrespective of the scope of the agent's authority, where the company claims the acceptance of the agent's note by the examiner as a payment or an estoppel.

JURY QUESTION. The question whether or not the plaintiff received the note of the third person in payment of the debt of defendant, may be withdrawn from the jury where plaintiff's positive testimony that he did not receive it in payment is not contradicted, and is corroborated by all the circumstances.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

TUESDAY, OCTOBER 5, 1897.

THE plaintiff, for cause of action, alleged, in substance, as follows: That the defendant is a corporation organized under the laws of the state of New York, and engaged in the business of life insurance; that plaintiff is a physician and surgeon engaged in practicing at Des Moines, Iowa; that prior to January 1, 1891, he was appointed by the defendant to examine applicants for insurance, under an agreement that the defendant would pay him five dollars for each person examined; that in pursuance of said agreement he did, during the period commencing with January, 1891, and ending with October, 1893, examine two hundred applicants, by reason of which there became due to him from the defendant one thousand dollars, with interest thereon from July 1, 1892, which sum is now due and wholly unpaid, and for which he asks judgment. The defendant answered, admitting its corporate capacity, the employment of the plaintiff as alleged, and that during the period named the plaintiff did examine two hundred applicants, but denies any indebtedness. The defendant alleges as defense, in substance, as follows: That under a contract between one L. B. Durstine and the defendant said Durstine received a certain percentage of the first year's premiums collected by him during the year 1891, and was to pay the fees of all medical examinations in connection with the business of his agency during such time, and that the examinations made by plaintiff were made at the instance and request of said Durstine; that on the seventh day of May, 1892, the plaintiff received the note of said Durstine in full satisfaction

of his charge against the defendant for said examinations; that defendant settled with said Durstine for the business of said year without deducting the amount due plaintiff for the examinations made by him as aforesaid, upon the belief on its part that the representations made to it by said Durstine that said bill had been paid by said note were true; that when advised by plaintiff that neither said note nor the renewals thereof had been paid by said Durstine, the said Durstine was insolvent, and defendant was without any remedy for the recovery of the amount of plaintiff's bill from said Durstine; wherefore defendant contends that plaintiff is now estopped from making any demand against it on account of said examinations. The case was tried to a jury, and at the conclusion of the evidence the court, on motion of the plaintiff, instructed the jury to return a verdict for the plaintiff, and verdict and judgment for one thousand one hundred dollars was rendered accordingly. Defendant appeals.—*Affirmed*.

Berryhill & Henry for appellant.

Guernsey & Baily for appellee.

GIVEN, J.—I. Appellant presents two questions, namely, whether the court erred in not submitting to the jury the question whether the notes of Durstine received by plaintiff were received in payment of his bill for medical examinations, and whether the court erred in rejecting certain evidence offered by the defendant in support of its defense of estoppel. It appears without conflict that for some time prior to 1891 the defendant was engaged in the business of life insurance, its principal office being in the city of New York. The plaintiff, a resident physician in the city of Des Moines, was employed as examining physician

at that city under an agreement that the defendant would pay for that service five dollars for each applicant examined. For services rendered prior to January, 1891, the plaintiff forwarded his bills to the office in New York, and they were paid by checks from that office. The defendant having established a branch office in the city of Des Moines, with L. B. Durstine as general manager for Iowa, the plaintiff thereafter rendered his bills to that office. The plaintiff alone was examined touching the alleged payment, and the following is the substance of his testimony on that subject: That Durstine represented to him that the collections in connection with the Des Moines office were slow, and that they desired time, and requested that plaintiff hold his bill until things got easier; that the bill for 1891 was not rendered until about May, 1892; that Durstine represented that the funds were such that they could not then pay the bill, and that the only way plaintiff could get the money was to indorse a note in blank until such time as the money came in, and he (Durstine) executed his promissory note for one thousand dollars payable to the plaintiff sixty days after date, at Des Moines National Bank, with eight per cent. interest. This note Durstine took to the plaintiff, who indorsed it, guarantying payment, and waiving notice and protest. Durstine then took the note to the Polk County Savings Bank, by which it was purchased at the face value, and for which Durstine received a certificate of deposit which he delivered to the plaintiff, and which plaintiff thereafter used. This note was twice renewed, Durstine executing and plaintiff indorsing each renewal. Durstine paid the interest on these notes up to September 1, 1893, and, being thereafter insolvent, plaintiff had to pay the last note and interest.

II. We first inquire whether the court erred in rejecting the evidence by defendant. The defendant

offered the written contract between itself and L. B. Durstine under which Durstine was employed. Of this lengthy instrument it is only necessary to notice that Durstine was to canvass personally, and through subordinates, for applications for insurance on the lives of individuals; that he was to be compensated by a certain per cent. on premiums on policies issued through his instrumentality, and that he was to devote his entire time and energy to that service. Said instrument contains this provision: "The said society agrees to allow the said party of the second part, during the year 1891, for expenses, — per cent. of the first year's premiums, which shall be in lieu of all expenses of every kind and nature whatsoever, chargeable to said society, including rent of office, clerical hire, cost of medical examinations, county, state, and city licenses to agents, and a reasonable amount of advertising." This offer was objected to as incompetent, irrelevant, and immaterial, "because it is not claimed that the plaintiff had any knowledge of the provisions of the contract." The objection was sustained. In this connection the defendant also offered to prove by Mr. Curran, inspector of accounts for defendant, that in October, 1892, he inspected the accounts of Durstine; "that in such inspection he called upon Durstine, or his employes, for a statement of the unpaid medical examiner's bills for his agency; that he was furnished a memorandum of such unpaid bills, and the bill of Dr. Hannawalt was not included therein." It was said: "The defendant, in making this offer, states that it does not expect to prove that the plaintiff knew what was upon the books of L. B. Durstine with respect to the account in question." It was further stated that defendant offered to prove by this witness that in October, 1892, he received for the defendant from Durstine four thousand five hundred and sixty-four dollars in payment of a balance due

the defendant at that time; that this did not include anything on unpaid medical examiner's bills, but that Durstine at that time agreed to pay these bills by the last of December of that year. Objections to these offers were sustained on the ground that they were incompetent as against the plaintiff, he having no knowledge of the matter sought to be proven. It being conceded that the plaintiff had no knowledge of the provisions of the contract offered, nor of the examination made by Mr. Curran, nor the settlement between him and Durstine, it is clear that he was not bound thereby, and that these facts in no wise constitute an estoppel against the plaintiff to make claim for compensation from the defendant. Plaintiff's contract for compensation was with the defendant, and not with Durstine. He had no knowledge of the agreement of Durstine with the defendant to pay for these medical examinations, and was not, therefore, bound to look to Durstine for his compensation. Plaintiff made no representations that misled Mr. Curran in his examination of Durstine's accounts, nor in the settlement that he made with him. We think it entirely clear that this evidence was incompetent as against this plaintiff, and that there was no error in excluding it.

III. Appellant contends that, notwithstanding the positive testimony of the plaintiff, that he did not receive the note of Durstine in payment of his bill, yet, under all the circumstances disclosed, the question whether he did so receive the note should have been submitted to the jury. It is argued that there is no evidence to show that Durstine had authority to bind the defendant by his declarations made to the plaintiff concerning the financial condition of the defendant or of the Des Moines agency. The declarations of Durstine constitute a part of the transaction upon which the claim of payment and

estoppel are based, and are not dependent upon the scope of the authority of Durstine. We will not discuss the evidence on this question further than to say, that we think a verdict for the defendant could not have been sustained under it. The testimony of the plaintiff stands uncontradicted, either by other witnesses or by the circumstances, wherein he says he did not accept the notes, or either of them, in payment of his bill. Our conclusion is, that the judgment of the district court should be AFFIRMED.

S. L. AUXIER v. PHILLIPS TAYLOR AND D. J. MARTIN,
Appellants.

102	673
104	554
102	673
106	948
102	673
124	228
102	673
130	96

Forfeiture of Land Contract: NOTICE A contract for the sale of land

- 1 provided that the vendee should pay the price on March 1, 1895, and that, "if said amount is not punctually paid, according to the foregoing agreement and on the day they severally become due, time being the essence of this contract," the vendor "is to have the right to declare this contract null and void, and all payments made thereunder and all improvements made thereunder forfeited, by giving the second party due notice thereof, and for thirty days prior to declaring the same forfeited." *Held*, that such contract could not be forfeited for failure to pay the price on March 1, 1895, until after thirty days' notice by the vendor to the vendee, that he elected to forfeit it, had been given, and continued failure of the vendee to pay within thirty days.

SAME. On February 26, 1895, the vendee admitted in a letter to the

- 2 vendor, that he was having difficulty in raising the money, but gave no intimation of intention to abandon the contract. The vendor, in reply, stated where the deed was; that the vendor could get it by making payment; that he considered the agreement forfeited, and asked if the vendee had any objection to let him know. *Held*, this was not the notice of forfeiture contemplated by the contract.

Tender: SPECIFIC PERFORMANCE. A purchaser under a land con-

- 3 tract is not bound to tender the balance of the purchase money before bringing the suit for specific performance, where the vendor has conveyed the land to a third person.

Appeal from Monroe District Court.—HON. M. A. ROBERTS, Judge.

TUESDAY, OCTOBER 5, 1897.

THE defendant, Taylor, entered into a written agreement to sell the plaintiff certain land, upon which the latter paid fifty dollars in cash, and was to pay the balance of the purchase price March 1, 1895. This he failed to do, and on the eleventh day of the same month Taylor conveyed the land to Martin. The plaintiff demands specific performance, and the district court so decreed. The defendants appeal.—*Affirmed.*

T. B. Perry for appellants.

W. S. Dungan and *T. M. Stuart* for appellee.

LADD, J.—Was the contract forfeited by the failure of the plaintiff to make payment on March 1, 1895, the very day named for so doing? It contains these words: "If said amount is not punctually paid, according to the foregoing agreements, and on the day they severally become due, time being the essence of this contract, then the party of the first part is to have the right to declare this agreement null and void, and all payments made thereunder and all improvements made thereunder forfeited, by giving the second party due notice thereof, and for 1 thirty days prior to declaring the same forfeited." It will be observed that forfeiture does not follow as a consequence of non-payment, but only the right of Taylor, the vendor, to declare a forfeiture. In this respect the contract differs radically from that considered in *Land Co. v. Mickel*, 41 Iowa, 402. There, the contract expressly provided that the rights of the

purchaser cease upon the failure to make payment on the strict terms and times limited, and this, without any declaration or act, as absolutely as though it had never been made. Here, the only result of a failure to comply with its terms, is the right accorded the vendor to declare it null and void. Thirty days after this is done, and the vendee notified, the agreement stands forfeited. *Coles v. Shepard* (Minn.) 16 N. W. Rep. 153.

II. Nor can it be said there was any declaration of forfeiture. The plaintiff candidly admitted in his letter of February 26 that he was having difficulty in raising the amount of money required, but gave no intimation of an intention to
2 abandon the agreement. Taylor, in reply, told him where the deed was, that he could get it by making the payment, that he considered the article of agreement forfeited, and asked if he had any objection, to let him know. The fact that he advised him he could have the deed at the bank by payment of the balance of the purchase price clearly indicates that he merely expressed the opinion regarding forfeiture, and did not so elect. If he so intended, however, he disposed of the land within the thirty days allowed by the contract after notice of forfeiture, and placed compliance with his part of the contract beyond his power. Auxier was entitled to this time within which to make payment and take his deed. Martin served notices of ownership, and demanded possession, but these did not recognize the agreement with Taylor, and were not intended as notices of forfeiture. None were ever given. The defendants went on the theory that the agreement was self-forfeiting, and ignored the rights of the plaintiff. It continued in full effect, and will be enforced.

III. No tender was made except in the petition. None was necessary. March 11, 1895, the plaintiff notified Taylor by letter that if the latter would send

a deed to the bank, drawn as directed, he would pay the money due. Taylor made no response, as he had
 3 that day conveyed the land to Martin, rendering it impossible for him to make the conveyance as agreed. It would have been entirely useless then to make the tender and demand the deed. The law will not indulge in idle formalities. See *Young v. Daniels*, 2 Iowa, 126; *Laverty v. Hall*, 19 Iowa, 526; *Harris v. Stone*, 8 Iowa, 322. The circumstances of this case particularly call for the intervention of a court of equity. The conditions of the contract are plain, and the defendants are without excuse in attempting to deprive Auxier of the benefits accruing from his purchase. Much is said because he had only a part of the price in ready money, but the evidence shows without dispute that he had arranged for the balance. It was not important to Taylor from whence the money came, nor was it discreditable to Auxier that he was compelled to borrow, by mortgaging the land, to meet his obligations. The decree of the district court makes ample provision in event of an appeal, and is **AFFIRMED.**

Q. J. DUFFIELD, Administrator, v. ALLEN WALDEN, et al., Appellants.

Executor and Administrator: APPLICATION OF PROPERTY. The heirs
 1 in a proceeding for the sale of decedent's real property to
 4 pay her debts may, for the purpose of exonerating the real estate, invoke an order of the court for a proper application of personal estate which the administrator claims in his individual right, and has failed to include the inventory.

Jury Trial in Probate: CONSTRUCTION OF STATUTE. While the county
 1 court existed, jury trial therein could be demanded only in special cases allowed by statute. The acts which transferred its powers to the circuit court authorize a jury in the trial of claims. Later acts allow one in on contest of probate. *Held*, it appears to be the legislative intent to limit jury trial in probate to cases where it is specially authorized, and hence jury trial is not a matter of right

102	676
108	430

102	676
111	185

102	676
140	357

in a contest between a surviving husband and heirs of his wife, over the distribution of her estate.

Evidence: PERSONAL TRANSACTION WITH DECEDENT. Where plaintiff is a surviving husband and administrator of his wife's estate, and defendants are the wife's heirs, claiming that a certificate of deposit in the wife's name, at the time of her death belonged to her estate, the husband is not a competent witness to show that he became the owner of said certificate through personal transactions with his wife, in view of Code, section 8639.

SAME. That a party against whom incompetent testimony as to a personal transaction with a deceased person is introduced has a right to cross-examine a witness does not cure the error in admitting the testimony.

Appeal from Appanoose District Court.—HON. T. M. FEE, Judge.

TUESDAY, OCTOBER 5, 1897.

PLAINTIFF is the administrator of the estate of Florence Duffield, deceased, who was his wife. Florence Duffield died without issue, and with only uncles and aunts as her heirs at law, who are the defendants in this proceeding. The estate of Florence Duffield consisted of real estate and personal property. In March, 1895, the plaintiff filed in the district court his petition representing that he had collected the claims due the estate, and sold the personal property belonging thereto, and that the proceeds were insufficient to pay the debts of the estate, and asked an order for the sale of the real estate after his distributive share therein should be set off to him. The defendants answered, denying that the personal property of the estate was insufficient to pay the debts, and averring that the plaintiff had neglected to inventory all the personal property belonging to the estate, and especially a certain certificate of deposit issued by the Centerville National Bank for between nine hundred and one thousand dollars. The plaintiff, in a reply, denied the averments of the answer, and upon a trial of the issues

the court found that during the pendency of the proceedings the real estate had been sold, in a proceeding by the husband to set off his distributive share, and that three hundred dollars remained, in the hands of the referees appointed to admeasure the distributive share, liable for the debts of the estate. It also found that the personal property of the estate was insufficient for the payment of the debts, and ordered the three hundred dollars in the hands of the referees to be paid to the plaintiff for that purpose. From the order of the district court the defendants appealed.—*Reversed*.

Hart & Posten and *Vermilion & Valentine* for appellants.

L. C. Mechem and *Mabry & Payne* for appellee.

GRANGER, J.—I. The defendants demanded a jury for the trial of the issues presented, which the court denied, and error is assigned on the ruling. Chapter 86, Acts Twelfth General Assembly, created the circuit and abolished the county court, which had exercised probate jurisdiction, which included orders of the kind sought in this proceeding. The act referred to, transferred jurisdiction in probate matters to the circuit court, and a later act, abolishing the circuit court, transferred such jurisdiction to the district court. In the county court, a trial by jury could be demanded in those cases only in which such trial was expressly given. *Gilruth v. Gilruth*, 40 Iowa, 346. Nothing in the acts changing the forum indicates a legislative purpose to change the mode of trial in probate proceedings, except in particular cases, where it is specified. Prior to 1873, a jury was not allowed in the establishment of claims against an estate. The act giving the circuit court jurisdiction in probate matters provides for a jury in such cases. Code, section

2411. By a later act,—Acts Sixteenth General Assembly, chapter 11,—a jury trial is authorized where the probate of a will is contested. The grant of such a right in particular cases, after abolishing the county court, is plainly indicative of the legislative purpose, and we are without doubt that, in such proceedings as this, a jury trial is not a matter of right.

II. Florence Duffield, in her lifetime, deposited in the Centerville National Bank nine hundred fifty-two dollars and eighty cents, and took a certificate of deposit therefor in her own name. After her decease the plaintiff, in his individual capacity, indorsed the certificate, and the bank paid him the money due on it. It is this money that the defendants claim belongs to the estate, and should be used in the payment of the debts, and, if so used, it would not be necessary to sell the real estate. This money is not accounted for by the plaintiff as belonging to the estate. The only items in the inventory are a piano, sewing machine, and six oil paintings. The certificate of deposit was in evidence, and, by the cashier of the bank, the facts as to its issue and payment were made to appear. The issue should now be definitely in mind, which is, does this money in the hands of the plaintiff, belong to the estate, so that it should appear in the inventory? The certificate was, by its terms, payable to the order of Florence Duffield. The testimony of the cashier, and the certificate, unin-dorsed by Mrs. Duffield, are a showing of ownership by the estate. This showing should be overcome, or the inventory be made to show the money as belonging to the estate. Mr. Duffield was a witness for plaintiff, and was asked whose property the certificate was when he got it cashed. Against objections to
2 his competency, he was permitted to answer, and he said, at first, that he thought it was his property. A cross-examination made it appear that

his claim of ownership was through a personal transaction with his wife. Defendants then asked the court to strike out the answer showing him to be the owner of the certificate, which the court refused to do. In this, we think, the court was in error. The situation was such that the money must belong to the estate unless Duffield should show himself the owner, and that could only be done by showing a personal transaction with his wife by which he became the owner. It is thought by appellee that the point is not controlled by Code, section 3639, but it seems to us to be clearly within its provisions. The defendants are heirs at law of Mrs. Duffield. The plaintiff is her husband, seeking to prove a personal transaction with her to establish a right as against her heirs at law. The section provides that: "No party to any action or proceeding, nor any person interested in the event thereof, * * * shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased * * *; against the * * * heir at law, * * * or survivor of such deceased person." Omitting the fact that Duffield is a party, in a representative capacity, and it still remains that he is a witness interested in the event of the suit, and clearly within the letter of the law making him incompetent. It is said that appellants had a right to cross-examine the witness. But that would not cure the error, for the incompetent evidence would still remain. It was their right to have the evidence excluded, and not considered. It is also said that the only question that can be considered is whether or not there is sufficient personal assets in the hands of the administrator to pay the debts, by which is meant that, whatever may be the facts, no order can be made as to the proceeds of the certificate. It is hardly to be believed that

heirs at law must, knowing that personal property belonging to an estate is not inventoried, and is in the hands of an administrator, submit to a sale of the real estate, in which they have an interest, without the right to invoke the order of the court for a proper application of the personal estate. That is what is sought in this case. No objection is made to this form of procedure, and we need not determine its regularity.

A query is submitted as to the right of creditors of the estate in case the money is misappropriated or lost. The case is not before us on such a state of facts.

We are to assume, for the purposes of this case, 4 that, if the money belongs to the estate, it will be placed there. We assume that no one would contend that the creditors must lose because of such default if the remaining property of the estate was sufficient to pay the debts. It is simply a question of the class of property to be applied. The judgment is REVERSED.

STATE OF IOWA, Appellant, v. W. H. BURLING.

102	681
113	706

Forgery. An instrument reading, "12 hogs 2730. H. Barnes," does not on its face create, or purport to create, any pecuniary demand or obligation nor any right or interest in or to any property whatever, within Code, 1878, section 3917, defining forgery as falsely making, with intent to defraud, any instrument in writing, being or purporting to be an act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is or purports to be created.

Indictment: UTTERING. An averment in an indictment for uttering a forged instrument which is not on its face the subject of forgery, that the instrument was designed, meant, and intended to create a legal liability against certain persons, brings the instrument within Code, 1878, section 3917, defining forgery as the falsely making, altering, forging or counterfeiting, with intent to defraud, any instrument in writing being or purporting to be the act of another, by which any pecuniary demand or obligation, or any

right or interest in or to any property whatever, is or purports to be created, as it does not matter whether the instrument if true would have created a legal liability or not.

Appeal from Fayette District Court.—HON. L. E. FELLOWS, Judge.

WEDNESDAY, OCTOBER 6, 1897.

THE defendant was indicted for the crime of uttering and publishing as true a false and forged instrument. The court directed the jury to find a verdict of not guilty, which was done, and the defendant was discharged. The state appeals.—*Reversed.*

Milton Remley, attorney general, *Ainsworth & Ainsworth*, and *H. P. Hancock*, county attorney, for the state.

Clements & Clements for appellee.

KINNE, C. J.—I. The material part of the indictment is as follows: "That W. H. Burling, at and within said county, on the third day of December, A. D., 1894, did unlawfully, feloniously, falsely, utter and publish, as true and genuine, a certain false, forged, and counterfeit instrument in writing, known as a 'weigh ticket,' as a true and genuine instrument of one H. Barnes, which false and forged instrument is in the words and figures following: '12 hogs 2730. H. Barnes;' said instrument purporting to be the number and weight of certain hogs weighed by said H. Barnes for the firm of Owens & Cook, as their agent, and delivered as such by said Barnes to said W. H. Burling, and same creating a pecuniary demand and obligation against said firm of Owens & Cook,—with intent then and there to do damage and to defraud said firm of Owens & Cook, he, the said W. H. Burling, at the time he so uttered and published said

instrument, well knowing the same to be false, forged, and counterfeit, contrary to the statute, etc. And so the grand jurors aforesaid accuse him, the said W. H. Burling, of the crime of uttering and publishing as true a false and forged instrument as aforesaid, committed at the time and place, and in the manner aforesaid." The defendant pleaded not guilty. On the trial, most of the evidence was ruled out, upon objections that it was irrelevant, and that there was no allegation in the indictment of the purchase of hogs by Barnes from the defendant; that the instrument was not sufficient in and of itself to be made the basis of the crime charged, and that no extrinsic facts were alleged in support of the instrument, so as to make it the basis of the crime charged; that the allegations of the indictment did not constitute a public offense; that the indictment alleged that the instrument, as it now is, was delivered to the defendant by H. Barnes, the agent for Owens & Cook.

II. The only question, then, presented for our consideration, is the sufficiency of the indictment. Our statute provides: "If any person utter and publish as true any record, * * * or any other instrument of writing mentioned in the preceding section, knowing the same to be false, altered, forged or counterfeited, with intent to defraud, he shall be punished. * * *"
Code 1873, section 3918. The preceding section referred to is one defining forgery, and the material part thereof reads thus: "If any person with intent to defraud falsely make, alter, forge or counterfeit any public record, * * * or any instrument in writing being, or purporting to be, the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is or purports to be created, increased, transferred, conveyed, discharged or diminished, he shall be punished. * * *"
Code 1873, section 3917. It is not seriously

claimed that the instrument set out in the indictment might not be the subject of forgery, and therefore of being uttered as a forged instrument, if such facts were stated in the indictment as showed it to be, or purport to be, the act of another, by which any pecuniary demand or obligation is or purports to be created. The claim on part of appellee is that on its face the instrument does not create any such demand or obligation, nor purport to do so, and therefore the indictment, to be good, must set forth such extrinsic facts as will show that it is an instrument of that character. We think it must be conceded that an instrument reading, "12 hogs 2730. H. Barnes," does not on its face create or purport to create any pecuniary demand or obligation, nor any right or interest in or to any property whatever. On its face it is not such an instrument as is the subject of forgery. That it may be shown by extrinsic allegations and evidence to be such an instrument as is embraced within the sections defining forgery and the uttering of forged papers there is no doubt. Are such facts sufficiently pleaded to bring the instrument within the sections referred to? We have said that "purport" means the design or tendency; meaning; import. *State v. Sherwood*, 90 Iowa, 553. The indictment, then, must be construed to charge that the instrument set out, in its altered condition, was designed, meant, and intended to create a legal liability against Owens & Cook. It does not matter whether in fact, if true, the instrument would have created a legal liability. The question is, did it purport so to do? Was it intended or designed to create such a liability? The charge in the indictment, in legal effect, is that it was so meant and designed, and that is sufficient. All that the statute requires is that the act charged as the offense be stated with such a degree of certainty, in ordinary and concise language,

and in such a manner, as to enable a person of common understanding to know what is intended, and the court to pronounce judgment upon a conviction, according to the law of the case. Code 1873, section 4305. The indictment fully complies with the above requirements.

III. From what appears in the record, it is evident that the trial court construed the indictment as charging that the instrument in question was delivered to the defendant in the condition that it appears in the indictment. The court appears to have misapprehended the force and effect of the language used. The charge is plainly made that the instrument as set out was a false and forged instrument, and that was the instrument which defendant is charged with uttering. The court therefore erred in its rulings in rejecting the testimony offered by the state.—REVERSED.

STATE OF IOWA V. EDWIN CLARK, *et al.*, Appellants.

Election Judges: REFUSING VOTE. The court charged that, in order to convict of refusing a vote it must be shown that the voter had complied with all requisites provided by law necessary to make it the duty of the judges to receive his vote, or that he offered to
1 comply therewith and was prevented by the judges, or that after he offered to comply with all such requisites, defendants wilfully refused to receive his vote. *Held*, error, for the reason that under this charge the jury might find defendants guilty whether a vote was offered them at a proper time, or not.

SAME. To render judges of election guilty of wilfully refusing the vote of an elector under Code 1873, section 4004, the offer to vote
2 must have been made to defendants while acting officially as judges of election, and an offer made before the election board was organized is not sufficient.

TEST OATH. A refusal to receive a vote after refusing the prescribed test oath is just as much a violation of law as though a ballot offered after taking such oath had been refused, and, to constitute a compliance with the law, it is not required that the person
3 who offers his vote shall take the oath before some other official qualified to administer it.

102 686
107 349
102 686
1108 213
102 686
1109 744
102 685
e129 130

"WILFUL" DEFINED. Whether the refusal of a vote was with or without just grounds for believing the refusal to be lawful is wholly immaterial in determining whether or not the refusal was wilful
 4 within Code 1873, section 4004, making judges of election guilty of an offense for wilfully refusing a vote of a person who complies with the requisites prescribed by law to prove his qualification.

Harmless error. Judges of election cannot complain, on appeal from a conviction under Code 1873, section 4004, for wilfully refusing a vote of a person who complied with the requisites prescribed by
 4 law to prove his qualifications, of an instruction which requires that the refusal shall have been without just grounds for believing it to be wilful, as the error is favorable to them.

Instructions Conflicting: DEGREE OF PROOF. A portion of a charge in a criminal case, authorizing the determination of certain facts
 5 in the case by a preponderance of evidence, is prejudicial, notwithstanding the jury were told in other portions of the charge
 6 that they must be satisfied from the evidence, beyond a reasonable doubt, of every material allegation of the indictment, before they could convict.

PROVINCE OF JURY. The jury was told in regard to ascertaining whether defendants in doing what they did honestly intended to comply with the law, or wrongfully intended to disregard it, that "you should consider the interest defendants had in the election, as shown by the evidence, if any, and the feeling between the voter and defendants as shown by the evidence, and from all the facts and circumstances fairly considered by you, determine whether or not the doing of the act complained of, by the defendants, and proven by the preponderance of the evidence were done with an honest intention to comply with the law or with the wrong intention to disregard it, and having determined these questions from the evidence, you should render a verdict in accordance therewith." *Held*, erroneous because it appears to assume, and may have induced the jury to believe that the acts essential to the crime charged, had been shown by the evidence.

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

WEDNESDAY, OCTOBER 6, 1897.

THE defendants, Edwin Clark and J. B. Story, were convicted of the offense of refusing, as judges of election, to receive a vote which was duly tendered,

and from a judgment which required each of them to pay a fine of twenty dollars and costs they appealed.—*Reversed.*

Cato Sells for appellant Clark.

Matt Gaasch and *J. D. & C. Nichols* for appellant Story.

Milton Remley, attorney general, for the state.

ROBINSON, J.—On the eleventh day of March, 1895, an election was held in independent district No. 7 of Jackson township, in the county of Benton, for the purpose of choosing a school director, and the defendants were judges of the election. The indictment charges that at that election they wilfully refused the vote of one J. C. Shaw, who insisted that he was entitled to vote, and offered to make oath to his qualifications as a voter, and wilfully refused to administer the oath which Shaw offered to take. It appears that Shaw was of foreign birth; that he came to this country when about three years of age, but that he had never received naturalization papers. It also appears that he had voted for years, and was one of the directors of the district, and that his right to vote had not been challenged previous to the election in question. There is evidence which tends to show that at some time during the meeting at which the election was held he offered to vote; that questions were asked him in regard to his qualifications as an elector; that the defendants expressed the opinion that he was not entitled to vote; that Shaw then said, "I will swear in my vote, and I will take the responsibility," but that an oath was not administered to him, and he did not vote. The defendants claim that the conversation in regard to the qualifications of Shaw, and his offer, if

any, to swear to them, occurred before the election board was organized, and that he did not make any offer after the poll was opened. Shaw also testified that he claimed to be entitled to vote because he had been in the army, and for the further reason that while he was but a child his father had voted.

I. The third paragraph of the charge given to the jury is as follows: "(3) Before you will be justified in convicting the defendants of the offense charged, you must be satisfied beyond a reasonable
1 doubt,—*First*, that said Shaw had complied with all the requisites provided by law necessary to make it the duty of the defendants to receive his vote, or that he offered to comply therewith, and was prevented from so doing by the wilful refusal on the part of the defendants to permit him to do so; or, *second*, that after the said Shaw had offered to comply with all the requisites prescribed by law to entitle him to vote, that the defendants wilfully refused to receive his vote." The appellants contend that this portion of the charge was erroneous for several reasons, among which is this: that the jury could have found the defendants guilty without finding that they at any time refused to receive the vote of Shaw. That seems to have been true, for the jury was told, in effect, that it would be justified in convicting the defendants "if Shaw had complied with all the requisites provided by law necessary to make it the duty of the defendants to receive his vote," whether he offered it or not. That this is erroneous is clear, and that it may have been prejudicial is shown by the fact that there is much evidence which tends to show that the judges of election were not ready to receive votes when Shaw made the offer upon which he relies. Section 619 of the Code of 1873 provides as follows: "Any person offering to vote, whether his name be on the register or not, may be challenged as unqualified by

any judge or elector; and it is the duty of each of the judges to challenge any person offering to vote whom he knows or suspects not to be duly qualified." The next section is as follows: "620. When any person is so challenged, the judges shall explain to him the qualifications of an elector, and may examine him as to his qualifications as an elector, and if the person insists that he is qualified, and the challenge is not withdrawn, one of the judges shall tender to him the following oath: 'You do solemnly swear that you are a citizen of the United States, that you are a resident of this precinct, that you are twenty-one years of age as you verily believe, that you have been a resident of this county sixty days, and of this state six months next preceding this election, and that you have not voted at this election,' and if he takes such oath his vote shall be received." Some of the evidence tended to show that the defendants not only suspected, but believed, that Shaw was not a qualified voter, and that there was reason for that belief. Hence it would have been their duty to challenge him had he tendered his vote, and to have tendered to him the oath provided for by section 620, if, after the proper examination and explanations had been

2 made, he insisted that he was entitled to vote.

But the offer to vote, the challenge, and the examinations and the explanations should have been made while the defendants were acting officially as judges of election; and to constitute the offense of which the defendants are accused an offer to vote while they were so acting was essential.

II. It is also urged that the third paragraph of the charge is erroneous, for the reason that it authorized the conviction of the defendants if Shaw offered to comply with the provision of the law which made it necessary for them to receive his vote, while section 4004 of the Code of 1873, makes a judge of election who wilfully

refuses a vote guilty of an offense, only when the person whose vote is refused "complies with the requisites prescribed by law to prove his qualifications."

3 We do not think the objection thus made is well founded. It is the duty of one of the judges of election to tender the statutory oath if the person offering to vote insists, after the required explanations are made, that he is entitled to vote, and the person so offering his vote complies with the law when he offers to take that oath to be administered by one of the judges of election. And in case such judges refuse to administer the oath, it is not necessary, to constitute a compliance with the law, that the person who offers his vote take the oath before some other official qualified to administer it.

III. The sixth paragraph of the charge contains the following: "(6). The word 'wilfully,' when used in a statute creating a criminal offense, implies the doing of the act purposely and deliberately, in violation of law, without just grounds for believing the act to be lawful." The appellants contend that the definition thus given is erroneous, and that, we think, is true. Whether the act in question was done
4 with or without "just grounds for believing" it to be lawful, was wholly immaterial. If it was done purposely and deliberately, it was done wilfully, within the meaning of the statute. *State v. Teeters*, 97 Iowa, 458. See, also, *Parker v. Parker*, 102 Iowa, 500. But the error was favorable to the defendants, and they were not in any manner prejudiced by it. The same is true of other portions of the same paragraph.

IV. The closing part of the sixth paragraph instructed the jury in regard to ascertaining whether the defendants in doing what they did, "honestly intended to comply with the law, or wrongfully intended to disregard its provisions," in language as

follows: "And for this purpose you should consider the interest that defendants had in the said election, as shown by the evidence, if any, and the feeling between the defendants and the said Shaw, as shown by the evidence, and from all these facts and circumstances, fairly considered by you, determine whether or not the doing of the acts complained of by the defendants, and proven by a preponderance of the evidence, were done with an honest intention to comply with the law, or with a wrongful intention to disregard the provisions, and, having determined these questions from the evidence, you should render a verdict in accordance therewith." This portion of the charge was erroneous, for reasons already stated in regard to the first part of the same paragraph, and we think it may have been prejudicial, for the reason that it appears to assume, and may have induced the jury to believe, that the acts of which the state complains had been proven by the evidence, thus taking that question from the jury; and for the further reason, if the jury understood that it was to determine the facts in the controversy, that it might do so from a mere preponderance of the evidence. It is true, other portions of the charge instructed the jury that it must be satisfied from the evidence, beyond a reasonable doubt, of every material allegation of the indictment before it could convict, but the portion of the charge in question was in conflict with that instruction, and it cannot be told what the jury followed. It is claimed for the state that there was no conflict in the evidence, but, if so, it shows that the examination of Shaw, and the refusal of his vote, if it was refused, occurred before the defendants were ready to receive the votes, and that is especially true of Clark. For the errors pointed out, the judgment of the district court is **REVERSED**.

STATE OF IOWA V. FRANK MILLMEIER, Appellant.

Corpus Delicti: ARSON. The phrase "*corpus delicti*" includes two elements: *First*, that a certain result has been produced, as that a man has died, or a building has been burned or a piece of property is not in its owner's possession; *second*, that some one is criminally responsible for the result. Citing *Ruloff v. People*, 18 N. Y. 179; *People v. Bennett*, 49 N. Y. 137; *Winslow v. State*, 76 Ala. 42; *Pills v. State*, 48 Miss. 472.

CIRCUMSTANTIAL EVIDENCE. Direct evidence is not indispensable to establish either of the elements of the *corpus delicti* in a criminal trial, but when circumstantial evidence is relied on it must be of the most cogent and irresistible kind.

ELEMENTS OF. In an arson case, to warrant conviction, there must be satisfactory proof that the building was feloniously and maliciously burned by some one and not accidentally burned.

RULE APPLIED. The existence of the *corpus delicti* may be found by the jury where the evidence showed that early in the evening of the night of the fire a rain storm commenced which changed to sleet and finally to snow; that defendant had been making threats against both his brother and H, owner and tenant, respectively; that he made contradictory statements as to his whereabouts on that evening; that he was last seen on such evening about 10 or 10:30 o'clock, in F; that the barn burned was between F and his house and he could pass it on going home without going far out of his way; that on the forenoon of the same day he passed the barn and remarked to a companion about it, and, in the same connection, said he was going to get even with the man who was using it; that as soon as the snow went off, which was within a week, footprints, similar in size and style to those made by defendant, were found leading from near the barn to or near the gate of defendant's premises; and that after defendant's preliminary examination he tried to intimidate some of the witnesses against him. Citing *Brooks v. State*, 51 Ga. 612; *Carlton v. People* (Ill.) 87 N. E. Rep. 244; *State v. Hallock* (Wis.) 26 N. W. Rep. 572; and *People v. Eaton* (Mich.) 26 N. W. Rep. 702.

Evidence: ARSON. On the trial of one charged with burning his barn which was in possession of defendant's brother as lessee, on November 24, a witness testified that in the previous October defendant told witness that he was going to get even with H and his brother. *Held*, that it was not error to overrule an objection to the question, "what, if anything, did he say about dynamite?" and permit the witness to testify that "he asked me to come out to his

102 692
106 646

109 692
d107 360

102 692
115 177

102 692
135 730

102 692
140 460

place, and asked me if I understood the use of dynamite, and I told him that I did."

SAME. And it was not error to admit evidence that the defendant
2 said he was going to get even with H and his brother, and that he
3 would give witness twenty-five dollars, and all witness had to do
was to touch a match.

OPINION EVIDENCE. One witness testified that he had noticed certain
peculiarities in defendant's footprints, that certain tracks leading
from the railroad to the burned building, and in the direction of
defendant's property, had the same peculiarities. Another testi-
6 fied that there was a similarity between the tracks described by
the former witness and those made by defendant, and that he
thought they were the same. Held, that such evidence was not
objectionable because it consisted of the witnesses' opinion. Citing
Crums v. State (Tex. App.) 18 S. W. Rep 868, and *State v.*
Ward, 61 Vt. 153.

RELEVANCY. Evidence that on January 29, after the fire, witness
heard defendant say to a companion that he was smart enough
and sharp enough to cover up his tracks, and that when this
blowed over he would open up the battle, was not admissible,
7 when the witness gave only the one sentence, and did not pre-
tend to know what the conversation was about, and there was
nothing to show that the defendant's statements related either to
the offense charged or to those whose property was burned.

EXCLUSION: *Harmless error*. The exclusion of the question to a
witness for the state, if he did not understand that he was to be
given his liberty after testifying in the case, if erroneous, is not
5 prejudicial, where the witness in answer to questions which were
not objected to, explained that he was held under bond to appear
as a witness in the case, and being unable to furnish it, was com-
mitted to jail.

IMPEACHMENT. A witness cannot be impeached by cross-examina-
4 tion eliciting that he has been in jail a number of times in the
county, and that he has had trouble with the officers.

New Trial: MISCONDUCT OF COUNSEL. Defendant was not entitled
to a new trial because the state's counsel, in his closing argument
to the jury, said: "There are witnesses who know that this man
11 was not at home that night (referring to defendant's wife). We
could not use her; could not if we wanted to; it would be an
impossibility. The law throws that shield and guard around her.
We could not use her, nor the defense has not seen fit to use her."
Nor because he also said that "defendant is not only charged with
a crime, but he is guilty of it."

THREATS. In an arson case, threats made by accused against the
person or property of the prosecutor may be shown, not only to

prove malice, but to connect the accused with the commission of the offense. Citing *People v. Eaton*, 59 Mich. 559, and *People v. Lablimore*, 86 Cal. 403.

Appeal from Lee District Court.—HON. HENRY BANK,
Judge.

WEDNESDAY, OCTOBER 6, 1897.

DEFENDANT was indicted, tried and convicted of the crime of arson, and from the sentence imposed, appeals.—*Reversed.*

Herminghauser & Herminghauser and W. W. Dodge for appellant.

Milton Remley, attorney general, and *Jesse A. Miller* for the state.

DEEMER, J.—Defendant is accused of having, on November 24, 1895, burned a barn belonging to one William Hoenig,—but in the possession of George Millmeier, a half brother of defendant, as lessee, at the time it was destroyed. The conviction was obtained on circumstantial evidence, some of the material parts of which will be hereinafter referred to.

The court permitted a witness for the state to testify that he met defendant at a certain saloon in October, before the fire, and that defendant said he
1 was going to get even with Hoenig and his
brother, George Millmeier. This witness was
then asked: "What, if anything, did he say
about dynamite?" To this defendant's counsel
objected, but the objection was overruled. Witness
then said: "He asked me to come out to his place,
and asked if I understood the use of dynamite,
2 and I told him that I did." The objection to the
question was properly overruled. Threats made
by the accused against the person or property of one

whose property is burned, may be shown to prove the existence of malice, and to connect the accused with the commission of the crime. *People v. Eaton*, 59 Mich. 559 (26 N. W. Rep. 702); *People v. Lattimore*, 86 Cal. 403 (24 Pac. Rep. 1091). For aught that appeared when the objections were interposed, counsel were inquiring as to what was said about dynamite at the time the defendant made the threat against Henry Hoenig and his brother; and it was properly admitted as a part of that conversation, if for no other reason.

Another witness was permitted to testify, over defendant's objection, that defendant said "he was going to get even with Hoenig and George Millmeier, and that he (defendant) would give him (wit-
3 ness) \$25, and said all he (witness) had to do was to touch a match." This evidence was clearly admissible.

On cross-examination of one of the state's witnesses, defendant offered to show that the witness had been in jail a number of times in the county, and that he had had trouble with the officers. Such
4 evidence was clearly inadmissible, and properly rejected. This same witness was asked if he did not understand that he was to be given his liberty after testifying in the case. An objection to the question was sustained. It appears that this witness was
5 held under bond to appear as a witness in the case, and, being unable to furnish it, was committed to jail. Under these circumstances, we doubt whether the question was a proper one; but if it was, the ruling was without prejudice, for the witness fully explained the matter in answer to questions which were not objected to.

Another witness for the state was permitted to testify that he had noticed certain characteristics and peculiarities in the footprints of defendant, and that certain tracks leading from the railroad to the burned

building, and in the direction of defendant's property, had the same characteristics and peculiarities as the tracks of defendant. Still another witness was
6 permitted to state that there was similarity between the tracks or footprints above described and those made by defendant. The objection, as we understand it, is that these statements are merely the opinions of the witnesses, and therefore inadmissible. Identity of footprints, as well as of individuals, is, of necessity, generally a matter of opinion, and the courts almost universally hold that a witness may testify that, in his opinion, certain tracks found near a burned building were tracks made by a certain person. *Crumes v. State* (Tex. App.) 13 S. W. Rep. 868; *State v. Ward*, 61 Vt. 153 (17 Atl. Rep. 483). The witness who made the last statement testified, in effect, not only that there was a similarity in the tracks, but that they were the same, he thought. There was no error in these rulings.

A street car conductor was permitted to testify that on the evening of January 29, 1896, he heard defendant say to a companion that "he was smart
7 enough and sharp enough to cover up his tracks, and that, when this blowed over, he would open up the battle." The objection to it was that it had no connection with the matter in controversy; that it occurred after the commission of the crime, and was immaterial and irrelevant. The argument in support of the objection is somewhat broader, in that it claims that this was but an extract from a conversation, the remainder of which the witness did not hear. There is no foundation in the record for this latter claim. With reference to the objection which was in fact made, it appears to us that the evidence was improperly admitted. The witness did not pretend to know what the conversation was about. He gave but this

one sentence, and we are asked to infer or hold that the jury was authorized to infer that it related to the burning of the building. There is absolutely nothing to show that this conversation related to the burning of the barn, or that the threat contained in it had reference either to the owner or to the occupant of the building. It may as well have referred to any other circumstance or to any other trouble. Before allowing it to be received in evidence, the court should have required some kind of showing that it related either to the offense charged or to the persons whose property was burned. The evidence was clearly irrelevant and highly prejudicial, and should have been rejected.

II. Counsel for the state, in his closing address to the jury, said: "Defendant is not only charged of a crime, but he is guilty of it." He also said: "There are witnesses who know that this man was not
8 at home that night [referring to defendant's wife]. We could not use her; could not if we wanted to; it would be an impossibility. The law throws that shield and guard around her. We could not use her, nor the defense has not seen fit to use her." Neither of these statements is sufficient to call for a new trial. *State v. Beasley*, 84 Iowa, 83; *State v. Cate*, 100 Iowa, 501; *State v. Toombs*, 79 Iowa, 741.

III. The only proof of the *corpus delicti* is that a barn belonging to Hoenig, and used by George Millmeier, was burned between 11 and 12 o'clock in the evening of November 24, 1895; that defendant, during a period covering two or more years, had made various threats against the owner and occupant; that, about a week after the fire, footprints similar in size and shape to his were found at or about the burned building, which led up to and in the immediate vicinity of his premises; and that he made various and contradictory statements as to his whereabouts on the

evening the barn was burned. Counsel do not agree as to what constitutes "*corpus delicti*," and we find that courts are as far apart as counsel in defining the term. The expression means, primarily, the "body of the offense." But, in applying it, courts and text writers have not at all times agreed as to what is meant by the "body of the offense." In our opinion, the term means, when applied to any particular offense, that the particular crime charged has actually been committed by some one. It is made up of two elements: *First*, that a certain result has been produced, as that a man has died, or a building has been burned, or a piece of property is not in the owner's possession; *second*, that some one is criminally responsible for the result. *Ruloff v. People*, 18 N. Y. 179; *People v. Bennett*, 49 N. Y. 137; *Winslow v. State*, 76 Ala. 42; *Pitts v. State*, 43 Miss. 472; *People v. Palmer*, 109 N. Y. 113 (16 N. E. Rep. 529). Applying this rule to an arson case, we held in *State v. Carroll*, 85 Iowa, 1, that there could be no conviction without satisfactory proof that the building was

feloniously, wilfully, and maliciously burned by some one, and was not an accidental burning.

Direct evidence to establish either of these elements is not required, but, where circumstantial evidence is relied upon, it must be of the most cogent and irresistible kind. *State v. Keeler*, 28 Iowa, 551.

In this case the burning of the barn is established by direct evidence, but there is no proof other than circumstantial that it was feloniously set on fire. The circumstances relied upon to prove that it was wilfully and maliciously burned, are, as a rule, those which tend to connect the defendant with the commission of the crime. That such circumstances may be considered in proving the *corpus delicti* seems to be well settled. *Carlton v. People*, 150 Ill. 181 (37 N. E. Rep. 244). These facts, then, with some others, appear

in evidence, which tend to prove that the building was fired by some one maliciously and feloniously.

11 The building was uninhabited. It stood away from any building in which fire was used.

A rainstorm commenced early in the evening of the night of the fire, which changed to sleet, and finally to snow. The defendant had been making threats against both the owner and occupant of the building, and was hostile to each of them. He made contradictory statements as to his whereabouts on the evening in question. He was last seen about ten or half-past ten o'clock in the evening of the day the fire occurred, in Ft. Madison. The barn in question was between Ft. Madison and his house, and he could pass it on returning home without going far out of his way. On the forenoon of the day of the fire, he passed the barn which was burned, and remarked to a companion about it, and in the same connection said he was going to get even with the man who was using it. As soon as the snow went off the ground, which was within a week following the fire, footprints similar in size and style to those made by defendant were found leading from near the barn to or near the gate leading to the defendant's premises. After the preliminary examination of defendant, he tried to intimidate and frighten some of the witnesses who had testified against him. These are the main circumstances relied upon by the state to prove that a crime was committed, and, in our opinion, they are sufficient; for, as said in the case of *Sawyers v. Commonwealth*, 88 Va. 556 (13 S. E. Rep. 708), at page 559, 88 Va., and page 709, 13 S. E. Rep. "Among the chief *indiciæ* which go to substantiate at once the *corpus delicti* and the guilt of the prisoner in a case like this, say the authorities, are the circumstances that the fire broke out suddenly in an uninhabited house, or in different parts of the same building, and that the accused had a cause of ill will

against the sufferer, or had been heard to threaten him." The cases of *Brooks v. State*, 51 Ga. 612; *Carlton v. People* (Ill. Sup.) 37 N. E. Rep. 244; *State v. Halleck* (Wis.) 26 N. W. Rep. 572; and *People v. Eaton* (Mich.) 26 N. W. Rep. 702,—are not stronger than the one at bar, and in each and every case a verdict of guilty was sustained.

IV. Some of the instructions are complained of. We have examined them all with care, and discover no error. As we have seen, threats made by the accused against the person or property of the prosecutor may be shown, not only to prove the existence of malice, but to connect the accused with the commission of the offense. See *People v. Eaton* and *People v. Lattimore*, *supra*; also, *State v. Day*, 79 Me. 120 (8 Atl. Rep. 544); *Bond v. Commonwealth*, 83 Va. 581 (3 S. E. Rep. 149). The court, in effect, so instructed the jury. It also instructed that they must find beyond all reasonable doubt that a crime was in fact committed. This covered the *corpus delicti*, and was sufficient. The court also fully instructed as to the law of circumstantial evidence, and the charge, as a whole, fully and fairly presented the law.

V. Appellant's counsel also argue that, conceding the *corpus delicti* to have been proven, there is not sufficient evidence to convict the defendant of the commission of the offense. As there is to be a re-trial of the case, it is better that we express no opinion upon this point. Some other errors are assigned, which need not be considered, as they will not arise upon a re-trial. For the error pointed out, the judgment is REVERSED.

VALENTINE HARLAN, Appellant, v. JACOB HARLAN, *et al.*

Contracts: STATUTE OF FRAUDS. An oral promise by one person to pay another for caring for a third person is not within the inhibition of the statute of frauds against oral promises to answer for the
 2 default or miscarriage of another, where the latter was *non compos mentis*, and no indebtedness was incurred by his estate, as a promise arising from an original consideration of benefit or harm moving between the contracting parties is not within the statute.

SAME. Furnishing board and performing services in strict compliance with an oral agreement to board and care for one in consideration of an interest in real property takes the agreement out of Code
 1 1873, section 3664, prohibiting the admission of oral evidence for the creation or transfer of an interest in lands except leases for a term not exceeding one year, by virtue of section 3663, providing that the former section does not apply where the purchase money, or any portion thereof, has been received by the vendor, as the term "purchase money" may mean property or labor performed.

CONSIDERATION. A promise to board and care for a third person whom
 8 neither of the parties is under legal obligations to provide for, is a valid consideration for the promise to pay for such board and service.

Appeal from Clarke District Court.—HON. H. M. TOWNER, Judge.

WEDNESDAY, OCTOBER 6, 1897.

GEORGE HARLAN was owner, in his lifetime, of the southeast quarter of section 27 and the north half of the northwest quarter of the northeast quarter of section 34, all in township 73 north, of range 25 west of the fifth P. M., and upon his death his will was admitted to probate, devising the land to his wife during her lifetime, and thereafter to Jerome Harlan during his lifetime, and upon the death of said Jerome to his other sons, Valentine and Jacob, share and share alike. Julia Harlan, the wife, died September 17, 1888, and Jerome Harlan March 15, 1894. The plaintiff,

102	701
110	503
102	701
112	171
102	701
114	576
102	701
121	120
123	197
102	701
125	623
102	701
129	198
102	701
132	574
102	701
137	624
102	701
142	619
102	701
143	181

Valentine, asks that the land be partitioned. The defendant, Jacob, answers that he and plaintiff entered into an agreement, by the terms of which defendant was to care for and keep Jerome, who was feeble-minded, during life, which he did, and in consideration therefor plaintiff agreed to convey his interest in the land to the defendant. In the cross-petition he asks that plaintiff be required to perform his part of the contract. Decree was entered as prayed by defendant, and plaintiff appeals.—*Affirmed*.

Temple & Hardinger for appellant.

Tallman & Crist and *McIntire Bros. & Jamison* for appellees.

LADD, J.—It is conceded in argument that Jerome Harlan was entitled to the use of the land in controversy while he lived, and that the remainder belonged to plaintiff and defendant, share and share alike. Jerome was feeble-minded and helpless, and could not talk, walk, or feed himself, dress or undress, or attend unaided to nature's calls. Upon the death of his mother, in 1888, the plaintiff became his guardian, and at once entered into an arrangement with the defendant, under which the latter kept and cared for Jerome from September 17, 1888, one year, and the plaintiff the year following, and so on alternately. The brother, when caring for Jerome, received four dollars per week for doing so, though this appears to have
1 been inadequate as compensation. Valentine and his wife went to Jacob's home September 17, 1893, in order to remove Jerome, as, under the arrangement, they were required to care for him the following year. While there, Valentine proposed that if Jacob would care for Jerome as long as he lived, Jacob might have the farm, and Valentine would

convey to him his interest therein. That this proposition was made is undisputed. That it was accepted and acted upon by the parties is very clearly and satisfactorily established by the evidence. Valentine and his wife say that the acceptance was conditional upon Jacob's staying at home, and assisting in the care of Jerome. But Valentine admitted, to at least six different witnesses, having made the contract, while Jacob and his wife testify that they accepted the proposition, and that Jerome was left with them, and cared for, in pursuance thereof.

II. The plaintiff insists that the agreement is within the statute of frauds prohibiting the admission of oral evidence "for the creation or transfer of any interest in lands, except leases for a term not exceeding one year." Code 1873, section 3664. This does not apply, however, "where the purchase money, or any portion thereof, has been received by the vendor." Code 1873, section 3665. The term "purchase money" means the consideration paid, and may be property or labor performed. *Devin v. Himer*, 29 Iowa, 297; *Stem v. Nysonger*, 69 Iowa, 512. The board was furnished and the labor performed in strict compliance with the agreement. That Jerome lived only a few months, instead of many years, was a contingency, without doubt, considered in making the contract. Having entered into the agreement to convey the land if defendant cared for his brother till the happening of an uncertain event,—i. e., the brother's death,—the plaintiff will not be relieved from fulfilling it, because this event occurred sooner than he anticipated. Having received all the consideration he bargained for, he will not, in the absence of fraud, be heard to complain. *Whitefield v. McLeod*, 1 Am. Dec. 269; *Smock v. Pierson*, 34 Am. Rep. 269.

III. It is said the oral promise to pay for the care of Jerome was within the statute of frauds. as

its purport was to answer for the debt of another.

But Jerome was *non compos mentis*,—incapable
2 of making a contract or of incurring indebtedness. Nor is it claimed he attempted so to do.

The theory of plaintiff seems to be, that as Jerome's estate was chargeable with the expense of his care and maintenance, a promise to pay therefor by plaintiff is within the statute. No expense had been incurred for the care of Jerome, or indebtedness, implied or otherwise, by his estate, so that the promise was not in any sense, collateral. The board and care was furnished on the faith of the agreement, and not on that of any implied liability of the estate. The facts bring the case clearly within the rule that a promise arising from an original consideration of benefit or harm moving between the contracting parties is not within the statute of frauds. *Johnson v. Knapp*, 36 Iowa, 616; *Chamberlain v. Ingalls*, 38 Iowa, 300; *Benbow v. Soothsmith*, 76 Iowa, 151; *Cooper v. Chambers*, 25 Am. Dec. 710; 2 Parsons, Cont. 21.

IV. Was the promise without consideration? It may be conceded that neither brother was under legal obligation to care for Jerome. It is said by Parsons,
the rule is perfectly well settled "that, if a
3 benefit accrues to him who makes the promise, or if any loss or disadvantage accrues to him to whom it is made, and accrues at the request or on the motion of the promisor, although without benefit to the promisor, in either case the consideration is sufficient to sustain assumpsit." 1 Parsons, Cont. 451. See *Blake v. Blake*, 7 Iowa, 46; *Handrahan v. O'Regan*, 45 Iowa, 298. Courts "will not ask whether the thing that forms the consideration does, in fact, benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, foreborne, or suffered by the party to whom the promise is made, as consideration for the

promise made to him." Anson, Cont. 63. In *Talbott v. Stemmons' Executor* (Ky.) 12 S. W. Rep. 297, abandonment of the use of tobacco was adjudged a sufficient consideration for promise to pay five hundred dollars. A promise to pay a nephew five thousand dollars, by an uncle, in event the former abstained from drinking liquor, using tobacco, swearing, and playing cards or billiards for money, until twenty-one years old, was held to be founded on a good consideration in *Hamer v. Sidway*, 124 N. Y. 538, 21 Am. St. 693 (27 N. E. Rep. 256). Also see *Lindell v. Rokes*, 21 Am. Rep. 395. Expenses incurred on a trip to Europe by a nephew, at the request of his uncle, is sufficient consideration for the latter's promise to reimburse him, though the trip was entirely for the nephew's benefit. *Devecmon v. Shaw* (Md.) 14 Atl. Rep. 464. So, too, it is held that a promissory note, executed by reason of a father naming a child after the promisor, and in pursuance of his agreement that if the child were so named he would provide for its education and support, is based on a sufficient consideration. *Wolford v. Powers*, 85 Ind. 294 (44 Am. Rep. 16). It is quite immaterial, then, whether the plaintiff derived any advantage from the contract. If the defendant waived some legal right to which he was entitled, or suffered some disadvantage, or did something at the plaintiff's request, the consideration was ample. The care of the imbecile brother was an almost unbearable burden, for which labor and means were necessary. While it may not have been a benefit to the plaintiff, it required sacrifice and expense on the part of defendant. These he undertook at plaintiff's request, and what he promised and did was a good consideration for the agreement to convey the land.—AFFIRMED.

THOMAS BLAZENIO V. THE IOWA AND WISCONSIN COAL
COMPANY, Appellant.

Fellow Servants: DELEGATED AUTHORITY. A master cannot escape responsibility for the negligent performance of his duty to provide
 3 his employe with a reasonably safe place to work in, by delegating such duty to fellow servants of such employe. Under such circumstances, these become the agent of the master.

Law of the Case: CONTRIBUTORY NEGLIGENCE. A miner is not, as matter of law, guilty of contributory negligence precluding recovery for injuries inflicted by the fall of slate from the roof of
 2 the entry to the mine, merely because he made no attempt to inform himself of the actual condition of the roof, where the instructions say, simply, that he could not recover if, by the exercise of ordinary care, he could have ascertained the dangerous condition of the entry. Such charge left the jury at liberty to find due care, though no such attempt was made.

Plea and Proof. An averment that defendant had actual knowledge of a fact does not preclude proof that defendant was negligent,
 1 through its failure to exercise ordinary care to know such fact, as such proof would not be inconsistent with said averment.

Appeal from Monroe District Court.—HON. M. A. ROBERTS, Judge.

WEDNESDAY, OCTOBER 6, 1897.

THE plaintiff was an employe in the defendant company's mine, engaged in mining coal. While working in the mine in August 1895, he was injured by slate falling from the roof of the mine, and this action is to recover damages sustained by the injury. The petition charges that while plaintiff was wheeling coal through what is known as "Second West Entry" there was a fall of slate from the roof of the entry, by which he was injured. It is charged that the injury was in consequence of defendant's negligence in failing to properly support

102	706
106	279
102	708
110	171
102	706
116	620

102	706
118	751

102	708
120	154
102	706
136	305

the roof of said entry with timbers or otherwise, there being no support of any kind, and that defendant well knew of the dangerous condition of the entry, and had been notified of it. The answer was a general denial. A jury returned a verdict for plaintiff for five hundred fifty dollars, and from a judgment thereon the defendant appealed.—*Affirmed.*

J. R. Sturdevant and T. B. Perry for appellant.

L. T. Richmond and George D. Porter for appellee.

GRANGER, J.—I. In the statement of facts it appears that the negligence as charged consisted in failing to properly support the roof of the entry with timbers or otherwise, there being no support of any kind. The petition contained the further averment that defendant had knowledge of the dangerous condition of the roof. The court, in its instructions, permitted the fact of negligence to be found if the roof was actually in a dangerous condition, and the defendant knew it, or by the exercise of ordinary care would have known it. It is urged that the instructions are erroneous because of the statement, that
1 a failure to exercise ordinary care to know
of the condition of the roof would be negligence.

We do not think the averment as to actual knowledge has the effect of preventing proof of negligence in any other way. The averment as to negligence was complete without the statement as to knowledge, and under it the rule of the instruction would have been proper. The effect of the averment as to knowledge is not to negative the existence of negligence because of other facts. It is not inconsistent with the fact of negligence because of the danger existing for such a time as to raise a presumption of knowledge. The difference is only that between

actual and presumptive knowledge, and the fact that one is averred does not prohibit a showing of negligence because of the other.

II. One McDowell was a miner in the employ of the defendant, and working in a room adjoining the entry where it is claimed the slate fell and injured plaintiff. It is urged that the evidence shows that the slate fell in McDowell's room, and not in the entry, because of which the verdict is contrary to the evidence. The court instructed that, unless the slate fell from the roof of the entry, there could be no recovery. It is true, there is evidence to the effect that the fall of slate was in McDowell's room, but there is also evidence that it fell in the entry. It is likely true that it fell in both places. The jury must have found that it did fall in the entry, and injure the plaintiff, and with that finding we are concluded, in view of the evidence.

III. It is urged that the evidence shows the plaintiff guilty of contributory negligence. This conclusion is based on the fact that the plaintiff, as a witness, testified that he paid no attention whatever to the condition of the roof in the entry; that he did not look at it, or think about it. There is no claim that, with

knowledge of the danger, he carelessly exposed
2 himself. It is simply a claim that he made no attempt to inform himself of the actual condition of the roof. It will be remembered that the entry was not the place where he was mining, so that he was in any sense charged with its making or keeping. It was a place provided for the workmen. In *Corson v. Coal Hill Coal Co.*, 101 Iowa, 224, we considered the question of the obligation of a miner as to looking to the safety of such an entry, holding that he was under no such obligation. In this case, however, the court instructed that the plaintiff was bound to use ordinary care to know if the entry

was dangerous. The following is the instruction: "*Seventh.* If you find that the said injury occurred in the entry as claimed, and you also find that the defendant was negligent in permitting the entry to be in the condition it was at the time, then you will inquire and determine whether or not the plaintiff himself exercised ordinary care to avoid the injury, or whether he was in any manner negligent in regard to the same. In determining this matter you will consider the age and experience of the plaintiff, the fact that he was an experienced miner, the length of time that he had worked in the mine, the number of times that he had had occasion to pass under the roof in controversy, what he knew or would have known by the exercise of ordinary care as to the condition of the roof. You will consider whether or not an experienced miner, in the exercise of ordinary care, passing under that roof in the condition in which the evidence shows it was at the time and prior thereto, would have discovered its dangerous condition; whether or not the plaintiff did in fact know, or would by the exercise of ordinary care have known of the condition; what he was doing at the time; you will also consider whether the evidence shows that he knew or had reason to believe that the duty of caring for the roof in the entry rested upon the defendant, and what effect that fact would have upon a person of ordinary skill and prudence in regard to a like matter. These facts, and all other facts and circumstances bearing upon the plaintiff's conduct and knowledge in the premises, you will consider, and from them all say whether or not he was negligent as defined in these instructions. If you find that he was negligent, he cannot recover. If he knew of the dangerous condition of the entry, if it was dangerous, or by exercise of ordinary care would have known it in time to avoid the injury, he cannot recover." It is said that the

instruction becomes the law of the case, which is true, and hence, that because of the testimony of plaintiff, showing that he did nothing to know of the condition of the roof, the fact of contributory negligence appears. The instruction does not specify in what contributory negligence would consist, except that it would be a failure to exercise ordinary care. It is the law that ordinary care did not impose on the plaintiff any duty of inspecting the roof or looking after it. He had the right to assume that exercise of care on the part of the defendant that would keep the roof in a reasonably safe condition; and until he was, in some way, apprised to the contrary, he could, without negligence on his part, act as if the roof were in such condition. We cannot assume that the instruction imposed on plaintiff any other duty, in the exercise of ordinary care, than as the law required. The jury could have said, under the instruction, that ordinary care was what the plaintiff did. The instruction gave no rule of ordinary care inconsistent with such a finding. The experienced miner had the right to treat the entry as safe, in the absence of information to at least put him on inquiry. We may assume that is the care ordinarily used. It was the care used by the plaintiff. It cannot be said that the instruction is to the prejudice of the defendant; nor does it, to justify a recovery by plaintiff, fix a state of facts inconsistent with the rule that the miner is not charged with a duty of looking or inquiring as to the safety of such an entry.

IV. It is said that the duty of inspecting the roof of the entry was imposed on McVey and Shellquist, who were employes of defendant, and that the neglect, if there was any, was theirs, and that,
3 as they were co-employes, there can be no recovery, under the general rule that an employer is not liable for the negligence of a fellow servant. The

rule invoked does not apply to the facts of this case. The negligence charged in this case is in failing to provide a safe place in which to work. In Bishop, Non-Cont. section 647, it is said: "The duty of providing proper appliances is not a thing pertaining to the service, but is the master's own. He may employ agents in discharging it, but the law does not deem them fellow servants, for the consequences of whose negligence he is not answerable to a servant. His neglect of the duty, whether personal or by agent, is his own." The next section applies the same rule to the place provided for work. We approved this rule in *Haworth v. Manufacturing Co.*, 87 Iowa, 765, and cited other authorities. See, also, *Fink v. Ice Co.*, 84 Iowa, 821. In the latter case, speaking of the duty of the master to provide a safe place to work in, it is said: "If he cannot do this himself personally, he must provide some other person to take his place, and the person to whom the master's duty is thus delegated, no matter what his rank or grade, no matter by what name he may be designated, cannot be a servant in the sense under the rule applicable to injuries occasioned by fellow servants." These authorities are decisive of this branch of the case. McVey and Shellquist, if intrusted with such a duty, were agents, to that extent, instead of fellow servants, for whose negligence the company was liable. The judgment of the district court will stand **AFFIRMED**.

SAMUEL S. COX, Administrator of the Estate of **GEORGE H. COX**, Deceased, Appellant, v. **THE CHICAGO & NORTHWESTERN RAILWAY COMPANY**.

Negligence: PROXIMATENESS: Rules. The fact that a train is running at a negligent speed will not entitle to recovery for the death of a fireman, in the absence of evidence that the death would not have occurred had proper speed been used.

SAME. A rule provided for certain speed in passing over switches.

It appears that its sole purpose was to guard against collisions
1 within station limits. An engineer caught up a tree lying across
the track without knowing it, and carried it on until a switch was
reached. There it came in contact with the switch and rails and
4 derailed the engine, killing the fireman. *Held*, the speed at the
switch is immaterial, for it appears that carrying the tree was the
proximate cause of the accident.

SAME. The rules of the company provided that, whenever violent
storms prevailed, trackmen should carefully examine the track;
that station agents should see that the foreman was on hand with
1 his men to protect the track; and that track foremen should
immediately, on the occurrence of such storms, take their men,
and proceed over their sections, and, if any place was found
unsafe, flag approaching trains. A storm having blown a limb
upon the track, a locomotive picked it up, and carried it into
another section, where it derailed the train, within about forty
5 minutes after the storm began. After the train had passed the
section where it picked up the limb, but within a little over twenty
minutes from the beginning of the storm, the trackmen were out
inspecting said section. *Held*, that defendant was not negligent
in not causing the section to be examined in advance of the com-
ing of the train.

Appeal: NOMINAL DAMAGES: *Harmless error.* While a verdict for
one dollar for causing the death of a fireman, is not warranted, it
2 will not be disturbed where there should have been no recovery
whatever.

SAME: Review. Such a verdict is, in fact, a verdict for defendant,
hence, on appeal of plaintiff, he is not confined to urging the
6 smallness of the recovery, but may present any point which he
could have urged had the verdict been for the defendant.

Appeal from Clinton District Court.—HON. P. B.
WOLFE, Judge.

THURSDAY, OCTOBER 7, 1897.

THIS is the second appeal in this case. See 90
Iowa, 54. The action is to recover damages resulting
from the death of George H. Cox, which is alleged to
have been caused by certain acts of negligence upon
the part of the defendant while said deceased was in
the employment of the defendant as a locomotive

fireman. The defendant answered, denying generally, and trial was had to a jury, and a verdict returned in favor of the plaintiff for one dollar. Plaintiff's motion for a new trial being overruled, judgment was entered on the verdict, from which judgment plaintiff appeals.—*Affirmed.*

Walliker Bros. for appellant.

Hubbard & Dawley for appellee.

GIVEN, J.—Plaintiff assigns as errors the overruling of each ground of his motion for a new trial, and the refusal to give certain instructions asked. There is but little contention, if any, as to either the law or the facts. The following will be a sufficient statement of the facts for an understanding of the questions to be considered: On and for some time prior to July 12, 1892, the deceased was in the employment of the defendant as a fireman on a locomotive engine. On the evening of that day, he was firing an engine drawing a train of freight cars eastward, to Clinton, John Fisher being the engineer. The train was stopped at De Witt for a short time, from whence it was intended to run past the intervening stations of Malone and Low Moor, to Clinton, without stopping. While at De Witt, a violent wind and rain storm from the northwest prevailed, but it partially subsided by the time the train started east, namely, about 8:20 o'clock. The train passed Malone without stopping. Immediately east of a bridge over Brophy creek, about two miles west of Low Moor, small branches and one or more large limbs were blown from some trees immediately north of the railroad, onto the track. Unknown to the engineer, a large limb was caught up by the engine, and carried along until the west switch at Low Moor was reached. When the limb thus

carried came in contact with the blocking and rails at the switch, it caused the front wheels of the engine to leave the track, and, although everything was done that could be to stop the train, the drive wheels also left the track, and the engine turned over, by reason of which George H. Cox was instantly killed. The train had been run from De Witt to Low Moor, a distance of ten miles, at fifteen and twenty miles per hour, the speed depending upon the grade; and, on nearing the west switch at Low Moor, it was slowed down to about fifteen to thirteen miles an hour.

Certain rules prescribed by the defendant for the government of its trainmen are in evidence. Rule 128 is as follows: "Freight and special trains must not pass over any switch at a speed exceeding
1 ten miles an hour." The other four rules are as follows: Rule 399: "Whenever violent wind or rain storms prevail, or in case of sudden rise of streams, either by day or night, it will be the duty of the trackmen to get out with proper danger signals, and carefully examine the condition of the track, bridges, culverts, etc., and, in case they are not entirely safe, will flag approaching trains, and report the conditions to the train dispatcher from the nearest telegraph station." Rule 411: "Station agents, telegraph operators, and watchmen will immediately report to their respective division superintendents whenever there is a severe rainstorm or high wind or sudden rise of streams in the vicinity of their stations, and will see that the section foreman is on hand with his men to protect the track from damage. They will also examine the tracks near their stations to see that no damage has been done, and that the cars have not been moved by the wind, so as to endanger the passage of trains. They will remain on duty under the above-mentioned circumstances until dismissed. If, from any cause, the division superintendent's office

cannot be reached by telegraph, they will notify the roadmaster, if possible, and all moving trains in the vicinity, of the storm or danger." Rule 412: "Track foremen will immediately, on the occurrence of such storms or swelled streams, take their men, and proceed over their sections, carefully examining the track, all bridges, culverts, and openings; and if any place is found unsafe, and cannot be immediately repaired, they will leave a man, or more than one, if necessary, to flag approaching trains, and will at once report the condition of their track to the division superintendent's office, and to the roadmaster, from the nearest telegraph office." Rule 414: "Conductors and engineers on the road, when overtaken between stations by such storms or indications of high water which will cause damage, will proceed with great caution, keeping their trains under complete control, and at such speed that they can be stopped after coming in sight of any obstruction or damage to the track in time to prevent accident. They will also stop and examine bridges and culverts, or other places liable to be damaged by high water, and, if they find any indications of danger from proceeding with their trains, will, on arrival at the first telegraph station, call up the agent or operator, and report to the office of their respective division superintendent for instructions, and will not proceed until such instructions are received."

A section gang, with headquarters at Malone, had charge of a section extending east from Malone, to a point one-quarter of a mile east of the Brophy Creek bridge; and a gang, with headquarters at Low Moor, had charge of the section extending from that point to a point east of Low Moor.

II. We fully concur in the view expressed by the learned judge who presided at the trial, in passing upon the motion for a new trial, that this verdict

cannot be sanctioned; that, if plaintiff is entitled to recover at all, he is entitled to recover a much larger sum; and that the verdict is virtually a finding
2 for the defendant. Surely, the plaintiff should not be prejudiced, nor the defendant benefited on this appeal, by the fact that the verdict is in form in favor of the plaintiff. Thus viewing the verdict, we proceed to inquire whether the court erred in either of the respects assigned and argued. The grounds of plaintiff's motion for a new trial are, that the verdict is contrary to the evidence, contrary to the instructions, is the result of a compromise, and inadequate in amount; also, that the court erred in refusing to give the instructions asked by plaintiff. The only issue of fact, other than the amount of damages, is whether the defendant was guilty of negligence in either of the respects charged and relied upon, and, if so, whether such negligence was the direct and proximate cause of the death of George H. Cox. Of the several acts of negligence charged, only the following are relied upon: That the train was run over the section at a negligent and dangerous speed, and in violation of the rules prescribed; that the train was run at a negligent and dangerous speed over the switch where the accident happened, in violation of said rule 128; that defendant was negligent in not causing the said sections to be examined in advance of the coming of said train.

III. As to whether the train was run from De Witt to near Low Moor at a negligent speed we need not inquire, as there is nothing to show that the speed of the train from De Witt to Low Moor was the cause
3 of the death of plaintiff's intestate. It does not appear but that the limb which caused the derailment would have been caught up and carried along as it was had the speed of the train been

less than it was. We think there is no evidence to sustain the first charge relied upon.

We have seen that the train was slowed to about thirteen to fifteen miles an hour in passing the switch, and that it was not intended to stop the train at the station of Low Moor. Plaintiff contends that this speed was in violation of said rule 128, and therefore presumably negligent, and that that speed was the
4 cause of the derailment and turning over of the engine, and of the death of his intestate.

Appellee contends, and the evidence shows without conflict, that the purpose of rule 128 is to prevent rear-end collisions with cars or trains within station limits; that the reason for the rule is not that it is more dangerous to run over a switch of this kind than upon any other part of the track, but is that engines and trains may be under such control within station limits as that they can be stopped in time to avoid collisions with other trains or cars that may be on the track within station limits. Whatever may be the reason for the rule, we are clearly of the opinion that the speed of the train was not the cause of this accident, and that, with the limb carried along as it was, the accident would have occurred if the speed had been at the rate of three or five miles per hour less than it was. Had the speed been but ten miles per hour, the derailment and overturning of the engine would as surely have followed as it did at thirteen to fifteen miles per hour. We think, under the evidence as to the purpose of rule 128, and the construction given to it by employes, the engineer was not negligent in running at from thirteen to fifteen miles per hour over that switch; but, conceding that he was, we are clearly of the opinion that the limb, not the speed, was the direct and proximate cause of the accident.

As to the charge that the defendant was negligent in not causing the section to be examined in advance of the coming train, we have this state of facts: The train stopped but a short time at De Witt, and
5 the storm started in while it was there, and lasted from twenty to thirty minutes. Though it had abated somewhat at the time the train left De Witt, at 8:20, it continued to blow with considerable violence up to the time of the accident, at 9 o'clock. It will be seen that but little more than twenty minutes elapsed between the commencement of the storm and the passage of the train over the Malone section, and only about forty minutes between its commencement and the accident. The tree from which the limb was blown that caused the accident stood immediately east of the Brophy creek bridge, and within the limits of the Malone section. Samuel Gilbert was employed as a trackman on that section, and testifies that they went in from their work for the night about 6 o'clock, but went out again between 8 and 9 o'clock. He says: "I can't tell exactly what time it was; it was during the time of the storm." He says that the train passed Malone as they were taking the car out of the house, and that they followed the train down as far as the end of their section. Now, it is apparent from this uncontradicted testimony that, within but little over twenty minutes after the commencement of this storm, these trackmen were out inspecting the track. The court refused an instruction submitting the question to the jury as to whether the section men at Malone were guilty of negligence in not making an inspection of the track before the train passed over it, and instructed the jury, in effect, as follows: That there was no evidence to justify a finding that the sectionmen at Malone were guilty of negligence in not making an inspection of the track before the train passed;

that there was no evidence that the inspection made was not made as soon as it could reasonably be done. While it is true that there is necessity for promptness on such occasions, and that the rules require promptness, and do not exempt employes from going into a storm, yet we think the brief time that elapsed between the commencement of the storm and the time that the sectionmen at Malone were out on the track justifies the instruction given and the refusal to give that asked. In other words, we are of the opinion that the plaintiff failed to establish this third charge of negligence.

After a careful examination of the record before us, we are led to concur in that further remark of the presiding judge that, in his judgment, under the evidence, this was an accident for which no one was to blame. We have examined the instructions refused in connection with those given, and fail to discover wherein any principle of law applicable to the facts of this case, presented in those asked, is not substantially embraced in those given. The instructions asked and refused are grounded largely upon the questions we have already considered and the refusal is

6 sustained by what we have said. Though the verdict is not to be sanctioned, yet, treating it as virtually a verdict for the defendant, we think it is fully sustained by the evidence, or, in other words, that the plaintiff failed to establish his right to recover in any sum whatever, and, therefore, that the court did not err in refusing a new trial, and its judgment is

AFFIRMED.

SUPPLEMENT.

[This case did not reach me in time to be published in its chronological order.—REPORTER].

102	720
100	280
101	188
112	720
109	422

A. T. ELWELL, Appellant, v. KIMBALL & CHAMP, *et al.*

Assignment with Preferences. A banking partnership, being insolvent, executed a number of deeds and mortgages to secure certain
 1 creditors, and a trust deed to plaintiff to secure depositors who
 were named therein as beneficiaries, plaintiff being a depositor for
 3 a nominal amount. A corporation of which the partners were
 controlling members, and to which the firm was largely indebted,
 also executed a general assignment. The trust deed, at the time
 of its execution, included practically all the property owned by
 the firm. *Held*, that the conveyances must be regarded as one
 transaction, constituting a general assignment, and therefore void,
 under Code, section 2115, declaring that no general assignment
 shall be valid unless made for the benefit of all the creditors.

EVIDENCE. The finding of the court that it was the intention of the
 parties to a deed of trust of substantially all the grantor's remain-
 1 ing property to make a general assignment, with preferences, is
 3 justified by evidence that the grantors were hopelessly insolvent,
 4 and were being pressed by creditors not secured by the deed.
 That the claims secured were based on misappropriations of trust
 funds by the grantors, except the personal claim of the trustee,
 which was evidently created in contemplation of the execution of
 the deed, and that the grantors made a number of other transfers
 the same day, or the day before.

TRUST OBLIGATIONS. The claims of the depositors named in the trust
 2 deed cannot be regarded as trust obligations, so as to entitle them
 to priority over the claims of general creditors.

Rule applied. A deed of trust is not taken out of Code, section 2115,
 providing that no general assignment by an insolvent for the benefit
 2 of creditors shall be valid unless made for the benefit of all
 creditors in proportion to the amount of their respective claims,
 4 because the claims preferred are based on misappropriations by
 the grantors of funds held in trust by a corporation of which they

were officers, and that they devoted the payment of deposits in a bank conducted by them, made after they knew they were hopelessly insolvent.

Appeal from Pottawattamie District Court.—HON. N. W. MACY, Judge.

WEDNESDAY, DECEMBER 9, 1896.

Suit in equity for the foreclosure of a trust deed. The Omaha National Bank, one of the defendants, filed an answer and cross-petition in which it was alleged that the trust deed was void. The decree sustained the claim set up in the answer and cross-bill, and the petition was dismissed. Plaintiff appeals.—*Affirmed.*

Burke & Casady and I. E. Congdon for appellant.

Wright & Baldwin for the Omaha National Bank.

ROTHROCK, C. J.—I. The case involves transactions of a partnership known by the firm name of Kimball & Champ, a corporation called the Kimball-Champ Investment Company, and other persons. There are a number of parties defendant. It is not necessary to set out their names. All necessary parties, including the said partnership and said corporation, were made defendants. The real contest, however, is between the plaintiff, who is the trustee named in the trust deed, and the Omaha National Bank. The case has not been argued in this court in behalf of any other party. The facts are quite voluminous, and the ultimate question for determination is whether the trust deed is void, under section 1 2115 of the Code, which is in these words: "No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid unless it be made for the benefit

of all his creditors in proportion to the amount of their respective claims." The district court made a finding of facts which included all of the pertinent acts and transactions of Kimball & Champ and of the investment company, as well as the facts attending the execution of the trust deed to the plaintiff. The findings of fact are as follows:

"First. That in or about the month of July, 1882, the defendants, John F. Kimball and George H. Champ, formed and entered into a co-partnership under the name and style of Kimball & Champ, composed of themselves, as individual members, both of whom resided at Council Bluffs, Iowa, and thereafter and thereunder engaged in the real estate, loan and banking business at Council Bluffs, Iowa, and continued therein up to and including the twenty-first day of July, 1891; that in or about the month of July, 1888, the defendant corporation, the Kimball-Champ Investment Company, was duly organized and formed, and thereafter, and up to the twenty-first day of July, 1891, was engaged in the business of loaning money, receiving deposits for investment, and transacting a financial business incident to loaning and investing money; that defendant John F. Kimball was president, defendant George H. Champ, vice-president and treasurer, and one C. B. Towle, secretary of said investment company, and Kimball and Champ and one George E. Gage, were its directors, and its principal place of business was at Council Bluffs, Iowa; that the secretary of the company resided at Council Bluffs, and Gage resided in New Hampshire and Massachusetts, and was the eastern manager of the company; that on, and for some time prior to, the first day of July, 1891, the Bank of Minden was a private bank, located at Minden, Iowa, and was owned and conducted by Kimball & Champ, one N. L. Trimble being the cashier.

"Second. That the co-partnership of Kimball & Champ, and the Kimball-Champ Investment Company occupied the same office room, and used the same furniture, fixtures, vault, and money drawer, and post-office box, and employed the same hired help.

"Third. That the following specific instruments were executed and filed for record at the date and by the parties indicated, to-wit: (1) A trust deed by Kimball & Champ to N. L. Trimble, trustee, for the benefit of the trustee, as cashier of the Bank of Minden, and the depositors in said bank, executed July 21, 1891, and filed for record July 22, 1891, at 5:10 o'clock P. M. (2) A mortgage on certain real estate, executed by Kimball & Champ to the Kimball-Champ Investment Company, on July 21, 1891, and filed for record July 22, 1891, at 4:20 o'clock P. M., to secure the payment of sixteen thousand five hundred dollars, subject to a prior mortgage on the same real estate, for seventy-five thousand dollars, to the Penn Mutual Life Insurance Company, and which mortgage on the same day was assigned by said Kimball-Champ Investment Company to George F. Wright, trustee, and which assignment was filed for record July 22, at 3:45 o'clock P. M. (3) A mortgage on certain real estate, executed by Kimball & Champ to William Siedentopf, on July 21, 1891, filed for record on July 22, at 3:55 P. M., to secure the payment of three thousand six hundred and eighty-five dollars. (4) A mortgage on certain real estate, executed by Kimball & Champ to J. P. Filbert, on July 22, 1891, at 4:10 o'clock P. M., to secure the sum of two thousand dollars. (5) A deed to certain real estate, executed by Kimball & Champ to the Kimball-Champ Investment Company, on July 22, 1891, filed for record at 4:40 P. M.; consideration named, ninety-three thousand five-hundred dollars; and the same consideration covers, as alleged, other property conveyed on the same day;

and which deed is subject to a prior mortgage of seventy-five thousand dollars to the Penn Mutual Life Insurance Company, and one of sixteen thousand five hundred dollars to the Kimball-Champ Investment Company, assigned to George F. Wright, trustee. (6) A general assignment by Kimball-Champ Investment Company to M. F. Rohrer, executed on July 22, 1891, and filed for record on the same day at 4:44 o'clock p. m., for the benefit of all the creditors of said company, as provided by statute. (7) A trust deed of certain real estate, executed by Kimball & Champ to A. T. Elwell on the twenty-second day of July, 1891, and filed for record on the same day at 4 p. m.; the same being the one sought to be foreclosed in this action.

"Fourth. That on said twenty-second day of July, 1891, Kimball & Champ were insolvent, and were heavily indebted to the investment company; that on said twenty-second day of July, 1891, out of funds of their own and of the investment company, Kimball & Champ paid off their own depositors, except A. T. Elwell, and provided means for and directed the payment of the depositors of the Bank of Minden, and thereafter they ceased to do business.

"Fifth. That on the twenty-second day of July, 1891, the plaintiff, as treasurer of the Council Bluffs Theater Company, had on deposit with Kimball & Champ, the sum of eleven dollars and fourteen cents, and on that date deposited in his own right the further sum of forty-five dollars; that prior to the said twenty-second day of July, 1891, certain notes had been sent to the Kimball-Champ Investment Company for collection and remittance, and which had been collected, or a secured note taken therefor, and the proceeds so coming into the possession of the investment company had not been remitted, but had been misappropriated, and such misappropriation had existed for some weeks prior to the said date, and the amounts mentioned

represent the amounts of such misappropriation, except those of plaintiff as treasurer, and in his own right.

"Sixth. That the plaintiff, on said twenty-second day of July, 1891, accepted the trust, and received the deed therefor, and at once filed the same for record; and thereafter he notified the beneficiaries herein named, of the said trust conveyance, and received acceptances thereof from all except J. J. Burns, hereinafter referred to.

"Seventh. That on said twenty-second day of July, 1891, Kimball & Champ were indebted to the defendant and cross-petitioners, the Omaha National Bank, in —, the sum for which judgment was thereafter rendered; that prior thereto Kimball & Champ executed and delivered to said Omaha National Bank the notes upon which judgment was rendered, and the proceeds so realized were passed to the credit of the Kimball-Champ Investment Company, and the account so arising with the Omaha National Bank was continued in the name of the investment company; that Kimball & Champ did not have an account with the Omaha National Bank; that on July 22, 1891, the investment company, through its president and treasurer, drew out all the funds with the Omaha National Bank, except twenty-six dollars; that on the twenty-second day of July, 1891, the said Omaha National Bank commenced an action by attachment against Kimball & Champ, John F. Kimball, and George H. Champ, upon the notes given as above, and on the twenty-third day of July, 1891, levied upon the real estate covered by said trust deed; that thereafter, and on the nineteenth day of May, 1892, judgment was rendered in said action in favor of the plaintiff, and against said defendants for the sum of eighteen thousand one hundred and fifty-eight dollars and fifty

cents, two hundred and sixty-four dollars and ninety-four cents attorney's fees and costs; that on the twenty-third day of October, 1891, the interveners, Wright & Baldwin, commenced an action by attachment against the same defendants, upon account, to recover the sum of one thousand dollars, and thereafter levied upon the same real estate, subsequent and subject to the levy of the Omaha National Bank, and the record fails to show any further proceedings therein; that on the twenty-eighth day of October, 1891, the intervener, J. Sullivan, in an action against the same defendants, attached the same real estate, and on the fourteenth day of September, 1893, judgment was rendered therein for four hundred and eighty-seven dollars and fifty cents and costs, and thereafter said Sullivan died, and Catharine and John Sullivan were appointed executors to his estate, and duly substituted therein; that, under the general assignment of the investment company to M. F. Rohrer, the assignee took charge of the office and property and funds of said company, and controlled and managed the same until, upon order of court, the same were given over to a receiver appointed therefor, and which receiver was Charles R. Hannan.

"Eighth. That the property included in the trust deed to plaintiff was practically all the property owned by Kimball & Champ at the time of the execution of such conveyance; that at the time none of the creditors of Kimball & Champ were pressing their claims for payment; that on the twenty-first day of July, 1891, the plaintiff was solicited by Kimball & Champ to act as trustee in a conveyance for the benefit of certain of their creditors; that prior to the time when plaintiff made the deposit of forty-five dollars with Kimball & Champ, on the twenty-second day of July, 1891, as aforesaid, and accepted the trust deed in

question, he knew of the failing condition of the Kimball-Champ Investment Company, and of the troubles of Kimball & Champ; that he did not demand payment of the deposit already made, but made a further deposit with Kimball & Champ, and accepted the trust deed, as before found; that the other beneficiaries in the trust deed did not have any knowledge of any indebtedness to them, nor of the proposed trust conveyance, and were not pressing any claims upon Kimball & Champ for payment.

"Ninth: That Kimball & Champ executed and delivered to plaintiff the trust deed in question when they were insolvent and unpressed by creditors, and with the design and intent of hindering and delaying their other creditors in the collection of their claims against them, and that plaintiff had knowledge of such fraudulent intent and design, and participated therein by his acts in connection with said trust conveyance.

"Tenth. That, by their acts, Kimball & Champ undertook to pay off and discharge all their own depositors, and also those of the bank of Minden, have the investment company make a general assignment and convey all their remaining property to a trustee, for the benefit of all parties whose money or property had been misappropriated, with the intent and design to secure a preference among their creditors, to protect themselves, and to prevent the Omaha National Bank and other creditors from attaching their property; that the conveyance to plaintiff was not made in good faith, and for the sole purpose of securing creditors, but was made for the purpose of securing a preference to creditors, and placing all their property beyond the reach of those creditors, sustaining a different relation to them from the beneficiaries named; that Kimball & Champ, at the time they executed and delivered the trust deed in question, did not hope or intend to make

the payments provided for, or to make redemption of the property conveyed, but, under the guise or appearance of giving security, they treated and regarded the conveyance as a mode of making a final disposition of the property; that Kimball & Champ, by the trust deed to Trimble and the one to plaintiff, surrendered the dominion and entire control of practically all their property, and thereafter ceased to do business, and thereby sought to make a preference of creditors."

An examination of the evidence in the case fully sustains the findings of the district court. Indeed, it may be said that the material and essential facts, as therein stated, are so conclusively established by the evidence that they ought to be regarded as undisputed.

II. Much of the argument of counsel of appellant is devoted to the proposition that the debts secured by the trust deed were such as might rightly be secured and paid in preference to the general creditors.

2 The argument is founded on the thought that

Kimball & Champ were trustees of the beneficiaries in the trust deed, and that the obligations were trust debts. The claims of the parties secured by the trust deed were sent to the Kimball-Champ Investment Company for collection and remittance, and the amounts due on some of them were collected, and secured notes were taken for others. No report of the collections and the taking of the secured notes was made to the parties entitled to the money and notes. On the contrary, they were "misappropriated," as found by the district court. There is no evidence that any of the proceeds of these collections were appropriated to the acquisition of any of the property included in the trust deed. As between the debt due to the Omaha National Bank and those due to the beneficiaries in the trust deed, there was no right of priority of preference which the beneficiaries in the trust deed could have enforced if there had been no

attempt made by Kimball & Champ to make a preference. This proposition is so manifestly correct that we do not think it requires further consideration. It is true, the debts due depositors for money placed in the bank, when every one connected with the partnership knew that it was hopelessly insolvent, and the laws for the punishment of émbézzlement, no doubt, were in the minds of the members of the partnership, and these obligations were of a more sacred character than their other debts. But that they were entitled to preference over other honest obligations cannot be admitted.

III. Section 2115 of the Code, above cited, has been in force in this state since the adoption of the Code of 1851. Certain questions under it were considered in the case of *Cowles v. Ricketts*, 1 Iowa, 582.

3 From that time to this there have been scores of cases in this court involving the application of that statute to the disposition of property made by insolvent debtors. In the leading case of *Burrows v. Lehdorff*, 8 Iowa, 96, it was held that, where several instruments were executed consecutively, each one subject to those preceding, and together constituting a disposition of all the debtor's property for the benefit of his creditors, but not in proportion to the amount of their claims, the various instruments will be considered as constituting one transaction, and as therefore void under the statute. There was no general assignment made in that case at any time, but it was held that the making of the instruments, which were bills of sale, was, in effect, a general assignment. And it has been held that a debtor may, in good faith, secure the claims of a creditor by a chattel mortgage, *Fromme v. Jones*, 13 Iowa, 474, or by an absolute sale of all his property in good faith, *Buell v. Buckingham*, 16 Iowa, 284. Another class of cases holds that a mortgage to one or

more creditors, made in good faith, is not void by the fact that the mortgage is executed in contemplation of insolvency, when the mortgagor afterwards executes a general assignment. *Lyon v. McIlvaine*, 24 Iowa, 9. See also *Aulman v. Aulman*, 71 Iowa, 124; *Lead Co. v. Haas*, 73 Iowa, 399; *Bolles v. Creighton*, 73 Iowa, 199, and many other cases. Some of the other cases present about the same state of facts, but in the large majority of them the transactions are such that the attending facts, such as the intention of the debtor to dispose of all of his property to a part of his creditors, the knowledge of the preferred creditors of such intention, and the time and circumstances attending the transfer, are considered in determining the question as to whether the acts of the debtor, in effect, constitute a general assignment with preference. In *Bank v. Crittenden*, 66 Iowa, 237, it is said: "The court has frequently heretofore had occasion to determine the legal effect of transactions in which insolvent debtors have made conveyances of all their property for the benefit of a part of their creditors, and it is settled by the cases that the question whether such conveyances should be regarded as an assignment for the benefit of creditors, or a mortgage for the security of particular debts, is to be determined by the intention of the parties, as it may be ascertained from the circumstances of the transaction." It will thus be seen that every case must be determined by a consideration of the facts attending the acts of the parties. Applying the rule above stated to the established facts in this case, we have no doubt that the court rightly held the trust deed to be void. We need not cite the facts, further than

4 to refer to the relation between the investment company and the partnership of Kimball & Champ. They were both hopelessly insolvent,—so much so that it appeared to Kimball & Champ that

practically all of their property must be at once devoted to paying or securing debts for which, if not liquidated in some way, they might incur criminal liability. While the instruments disposing of their property were not as nearly related to each other in point of time as in the case of *Burrows v. Lehndorff*, *supra*, and other cases, yet the different transactions were as nearly simultaneous as it was practicable to make them. The trustee selected to represent the beneficiaries in the trust deed was a mere nominal depositor in the bank, and nearly all of his deposits were made under such circumstances as to induce the belief that it was done to qualify him to make the claim that the instrument was made, not only for the benefit of the parties to be secured, but for himself as well. Our conclusion is that the decree of the district court should be, and it is, **AFFIRMED**.

APPENDIX

Notes of Cases Not Otherwise Reported.

ELIZA T. CLARK, Appellant, v. GEORGE SOMMERS, JEFF PHILLIPS,
and THOMAS LANSING.

CLARK v. RIDDLE, 101 IOWA, 270, FOLLOWED.

Appeal from Linn District Court.—HON. W. G. THOMPSON, Judge.

WEDNESDAY, FEBRUARY 10, 1897.

SUIT in equity to abate and enjoin a liquor nuisance. Decree dismissing plaintiff's petition, and she appeals.—*Reversed.*

Rickel & Crocker for appellant.

Wm. Smyth and Preston, Wheeler & Moffit for appellees.

DEEMER, J.—The controlling questions in this case are decided in *Clark v. Riddle*, 101 Iowa, 270. Following that opinion, the judgment

and decree must be REVERSED. GRANGER, J., adheres to his dissent in that case. A decree will be entered in this court as prayed, which will include a fee of one hundred dollars for plaintiff's attorneys.—**REVERSED.**

HENRY BAUMHOVER v. M. L. GREGORY, *et al.*, Defendants, THE
FROST MANUFACTURING COMPANY, Appellant.

MECHANIC'S LIEN DENIED—*Evidence.*

Appeal from Montgomery District Court.—HON. WALTER I. SMITH,
Judge.

THURSDAY, APRIL 8, 1897.

ACTION in equity to foreclose a mortgage upon real estate. The
Frost Manufacturing Company, by answer and cross-petition, claim to
(733)

have a mechanic's lien upon the mortgaged property, which claim the plaintiff denies.

The issues and facts appear in the opinion.

Decree was rendered dismissing said cross-petition and from this decree the defendant company appeals.

Smith McPherson and T. J. Hysham for appellant.

J. M. Junkin for appellee.

GIVEN, J.—I. The property in question is a small tract of land with a grist mill thereon. On the twenty-ninth day of June, 1892, the plaintiff conveyed said property to the defendant, W. F. Dutton, and took the mortgage sued upon to secure payment of part of the purchase price. On the same day, Dutton executed another mortgage on said property to one Theodore Bauer, which mortgage is now owned by the defendant Paul Traut.

Prior to, and for some time after these transactions, said mill was operated by water power.

In January, 1893, the appellant furnished to Dutton, an engine, boiler, pump, and other appliances, necessary to run said mill by steam, to the value of one thousand, nine hundred and forty dollars and forty-two cents. An addition was erected to the mill, against the south side, in which to place this machinery, and it was placed therein, in the usual manner of setting such machinery, and connected with the gearing of the mill.

On the fifth day of May, 1893, appellant filed its statement for a mechanic's lien, and it is upon this statement that the lien is now claimed.

Appellees contend that the statement is illegal, and of no effect, for the reason that collateral security was taken for the purchase price of said machinery.

The facts concerning the purchase, as shown by the statement, and necessary to be noticed, are as follows:

On January 3, 1893, appellant submitted to Mr. Dutton, two proposals, on printed blanks, for furnishing this machinery, one (Exhibit A) for furnishing a boiler, water heater, pump, etc., and the other (Exhibit B), for furnishing an engine.

The blanks in these proposals were filled in, the whole showing full details as to machinery to be furnished and in each reference is made to "supplement attached" for "price when delivered."

The supplement attached is as follows:

Date, January 4, 1893.

To the Frost Manufacturing Company, Galesburg, Ill.:

Ship to W. F. Dutton,

Place, Red Oak, Iowa.

Via. C., B. & Q. R. R.

Terms, see below.

This order is not revocable, but is subject to the approval of the parties to whom it is addressed, who will acknowledge its receipt and

approval. All our goods are shipped owner's risk released, unless ordered otherwise. No agreements of salesmen or agents recognized unless specified in this order.

Engine, boiler, heater, and pump, with fittings as per attached detail. Price F. O. B., Galesburg, Ill., eighteen hundred and fifty-six dollars. Five hundred dollars on receipt of machinery, balance in two payments—September 1, 1893, and January 1, 1894, at eight per cent. Security on machinery and insurance in our favor in amount deferred payments.

Accepted.

(Signed)

W. F. DUTTON.

The proposal Exhibit A contains in print a paragraph as follows: "The title in this machinery to invest in you only on full compliance with the above terms and conditions." The proposal Exhibit B, contains this paragraph in print:

"It is agreed that the engine, etc., above specified shall remain our property until fully paid for in cash. There are no understandings or agreements outside of this writing."

Appellant filed its answer and cross-petition asking that said mechanic's lien be established and foreclosed.

Appellees demurred on the ground that the statement for a lien shows that the title to the machinery was to remain in the appellant until paid for, and that thereby appellant took collateral security and for that reason is not entitled to a lien.

This demurrer was sustained January 24, 1894, and at the September term, 1894, appellant amended its answer and cross-petition by striking therefrom the following: "Title to this machinery to vest in you only on full compliance with the above terms and conditions."

Also the following: "It is agreed the engine, etc., above specified, shall remain our property until fully paid for in cash."

Appellant further amended by alleging in substance that its intention and understanding was that Dutton was to purchase and take possession, control and title to the machinery on delivery; that it was mutually so understood between them, and that the above language stricken from the answer and cross-petition never constituted a part of the agreement, and was omitted to be stricken from said proposals and was left therein by a mutual mistake and oversight of appellant and said Dutton.

Plaintiff joined issue on these allegations and upon these issues the court found against the appellant and dismissed its cross-petition in so far as it asked that a mechanic's lien be established in its favor.

II. Appellant does not question that if the machinery was furnished upon the terms contained in the proposals it is not entitled to a mechanic's lien. The contention is that the provisions in the proposals as to the title to the machinery, are contrary to the intention and agreement of the parties and were permitted to remain in the proposals by mutual oversight and mistake.

The Defendant Dutton and J. M. Harris, agent of appellant, who submitted said proposals, were examined at length upon this issue. Most of their testimony thereon was objected to, and certainly much of it is objectionable as stating inferences and conclusions of the witnesses and upon other grounds, but we will not here consider these numerous objections in detail.

It is sufficient to say that we have no doubt but that these witnesses each intended to be understood as testifying that Dutton was to take title to the machinery on delivery and that the provisions to the contrary were allowed to remain therein by mutual oversight and mistake.

Mr. Harrington, secretary and treasurer of the appellant company, testified that it was his intention to deliver and give Dutton possession and title to the machinery.

Against this testimony as to the intention of the parties we have the facts and circumstances attending the transaction, and which, we think, fairly show: that the intention was as expressed in the proposals.

Mr. Harris, as agent of the appellant, was engaged in soliciting orders for machinery, and for that purpose was provided with printed blanks, the same as used in this instance by the appellant. The form for proposals contained provisions as to title, under consideration. The supplement to that form of proposal, provided that "no agreement of salesmen or agents recognized unless specified in this order." This was notice to persons dealing with agents to require that all agreements made by them should be specified in the order. That form of supplement also provided that "security on machinery and insurance in our favor in amount deferred payments." This certainly indicates a purpose on part of appellant to have security on the machinery, and the proposals left no doubt that the way was by retaining title until the terms of the purchase were performed by the purchaser. In exhibit B, it is expressly provided that "there are no understandings or agreements outside of this written contract."

In filing its statement for mechanic's lien and in its answer and cross-petition asking that that lien be established and foreclosed, the appellant stood upon these instruments just as they were written and without any intimation of mistake or oversight.

It was not until several months after the ruling on the demurrer that appellant was first heard to even intimate that there was a mistake or omission in the writings under consideration.

We will not extend this opinion by noticing other facts and circumstances which, we think, tend to rebut appellant's contention. It is sufficient to say that after a careful consideration of the evidence as shown in the transcript, we think it fails to support appellants contention with that degree of certainty that is required to overcome the clearly expressed language of the writings.

For these reasons we conclude that there was no error in dismissing appellant's cross-petition in so far as it asked the establishment

and foreclosure of a mechanic's lien. This conclusion renders it unnecessary that we consider other questions discussed that would have followed an establishment of the lien.

The judgment and decree of the district court is **AFFIRMED**.

Laura A. WHEATLEY, Appellant, v. ELLIS WHEATLEY.

FRAUD AND UNDUE INFLUENCE—*Evidence.*

Appeal from Story District Court.—HON. S. M. WEAVER, Judge.

FRIDAY, APRIL 9, 1897.

THE plaintiff is a lady some seventy-four years of age, and the defendant is her son. Plaintiff owned one hundred and eighty acres of land, and some personal property, and was indebted in the sum of over one thousand dollars. On the twenty-ninth of October, 1894, the plaintiff and defendant entered into a written agreement whereby defendant was to pay plaintiff's debts, and provide a home and comfortable living for her during her life. It was provided that, in case she should live elsewhere than with him, defendant was to pay her the sum of two dollars and fifty cents per week for her support. As a consideration for the undertakings of the defendant, as expressed in the agreement, plaintiff was to convey to him the one hundred and eighty acres of land, and her personal property. Among the reasons for her entering into the contract, as stated therein, it appears that she had been subjected to expense and annoyance in an attempt to have a guardian appointed for her, and she feared a repetition of such attempt by her children, or other trouble growing out of the property, and that she only desired to be assured of a comfortable living. On the twenty-seventh of December, 1894, this action was commenced to set aside the conveyance, on the ground that it was obtained by misrepresentations and fraud. On the trial in the district court the petition was dismissed, and the plaintiff appeals.—*Affirmed.*

Funson & Gifford and H. E. Long for appellant.

D. J. Vinje for appellee.

GRANGER, J.—It will be seen, that the action was commenced about two months after the contract was entered into. The plaintiff is a widow, and has been since 1870. She has, besides the defendant, six children. The claim of fraud and misrepresentation is, that defendant and others represented to her, and caused her to believe that she was to lose all her property in litigation and attorney's fees; that lawyers were going to bring an action in the court the moment she got sick, or her health bad, and have her declared insane and of

weak and feeble mind; that she would be driven from her home and left without support; and that her only way to save her land was to deed it to the defendant,—and that by reason of these representations, she became bewildered, and believed the representations, and thus made the conveyance. We have seldom read a case in which so grave a charge came so far short of being established by the proofs. It is not to be said, that the record does not disclose conditions and facts to be regretted; for it seems to us a plain case of an aged mother being made, because of her estate, an object to bear the consequences of an unseemly strife between her children for purposes of gain. We will not set out the evidence or facts, further than to say that, beyond doubt, the plaintiff expressed a principal reason for her act in making the contract when she recited in the agreement, that she did it to avoid annoyance and trouble from her children. She seems to be a woman of merely moderate intelligence, industrious, and needful of counsel and guidance in the management of business. The record is not a showing of undue influence or of fraud in the inception of the contract. The record is more a showing of improper treatment, and of a bad bargain, than of fraud or undue influence. It is, as is true generally in family quarrels, a picking up of isolated facts, great and small, and bringing them together for an undue effect. From a separate reading of this record, no one doubts the correctness of the judgment of the district court in dismissing the petition. The contract is undoubtedly an unfortunate one, because, quite likely, the defendant has not observed it in good faith, as its letter and spirit require, but that is not the question before us. The contract is certainly unfortunate, in the light of the reprehensible contention of her children, the consequences of which, barring the disgrace, fall upon her. It is one of those cases where aged persons make mistakes from which it would be a satisfaction to relieve them, but where the obligations of contract bind them to an unfortunate situation. The defendant had been with her for years before the contract was made, and she knew him, and evidently felt that by making the contract she was doing what was best for her, in view of the surroundings. It is quite probable that, if the parties were left free from the influence of others she might realize what she expected. The judgment is **AFFIRMED**.

J. H. PHILLIPS, Trustee for JOHN WILSON, v. OLOF LUND AND
GEORGE YARN. Appellants.

REFORMATION EVIDENCE—*Review on Appeal.*

Appeal from Polk District Court.—HON. C. P. HOLMES, Judge.

FRIDAY, APRIL 9, 1897.

ACTION in equity to compel the defendants, as co-sureties with John Wilson who paid the debt secured, to contribute their portion of the amount paid.

Defendants answered setting up certain defenses as will hereinafter appear; judgment was rendered in favor of plaintiff against each of the defendants, and from which they each appeal.

Read & Read for appellant.

W. G. Harvison for appellee.

GIVEN, J.—I. There is no question that unless one or more of the defenses pleaded are established, the plaintiff is entitled to judgment as rendered.

The contentions will be better understood by stating the following facts, about which there is little, if any, dispute.

On and after April, 1889, a corporation called the Bloomfield Coal & Mining Company, was operating a mine on land leased from O. C. Peterson. At that time the company was composed largely, if not entirely, of O. C. Peterson, H. C. Hansen, D. Lund, L. Stahlgreen, John Wilson, Fred Johnson, George Yarn and C. L. Dahlberg, all of whom were stockholders, and most of whom were officers of the corporation. The coal under the Peterson land had been so far exhausted that the company was mining on adjoining land, and desired to secure from Peterson the privilege of taking out the coal so mined, through the entry and shaft on his land. Peterson desired to borrow four thousand dollars from Hansen on the land as security, but there being other mortgages upon it, it was not deemed sufficient.

The proposition that the company would go security for Peterson if he would grant said privilege, was discussed and the conclusion reached, that the company could not, or would not, go as such security. On the second day of April, 1889, said Lund, Stahlgreen, Wilson, Johnson, and Yarn signed five promissory notes for eight hundred dollars each as security for Peterson to Hansen, which notes were further secured by mortgage on said land, and of which notes the two in suit are a part. In 1892, Hansen brought his action on these notes, they being unpaid, against all the makers, for judgment and foreclosure of said mortgage. Judgment and decree of foreclosure were

rendered on default against all the said defendants except these defendants, Lund and Yarn, who appeared and answered substantially as they have answered in this case. Special execution was issued on said judgment for the sale of the land and it was bid in by Wilson for eighty-two dollars and sixty-nine cents. Wilson, to protect himself from execution did, on March 24, 1893, pay to Hansen one thousand nine hundred and seventy-four dollars and thirty-four cents, the amount of said judgment, and took a transfer thereof and of the notes upon which it was rendered to J. H. Phillips in trust for Wilson. Subsequently Stahlgreen and Johnson paid to Wilson their portion of said judgment.

II. The defendants set up these defenses, namely: That they signed said notes at the solicitation of John Wilson and upon his representation that C. L. Dahlberg would sign the same, and his promise and agreement that said notes would not be delivered unless Dahlberg did sign them.

That as a further inducement for them to sign said notes, said Wilson promised and agreed that he would not deliver them unless Peterson granted to said company the right to take out coal mined on adjoining lands by way of the entry and shaft on his land.

They allege that Wilson wrongfully and fraudulently delivered said notes without their being signed by said Dahlberg and without said Peterson having granted said privilege to the Coal company.

These two defenses may be considered together. The evidence in relation to them is conflicting. Lund and Yarn testifying one way and Stahlgreen and Wilson another, as to what took place at the time defendant signed the notes. It seems probable that defendants did expect Dahlberg would sign the notes, and that the company would secure the desired privilege by those persons enabling Peterson to borrow the money. These expectations were based upon talks they had generally upon the subject, and not upon any representation, promise or agreement made by Wilson.

Wilson was not an officer of the company, and but recently a stockholder. The preponderance of the evidence is in favor of the conclusion that it was Stahlgreen who was president of the company, who took the notes of defendant to sign, and that whatever was said as inducement, was by him and not Wilson.

We think the defendants have failed to sustain either of these defenses by a preponderance of the evidence.

III. The other defense alleged is in substance this: That there was pending in this court on appeal, and in the district court, suits growing out of the business and affairs of said corporation. The said action of Hansen against these defendants and others, in which these defendants had answered, was also pending on their said answer. That it was proposed to settle all matters in controversy growing out of said litigation, and that these defendants required as a condition of their consent to the settlement of said causes, that the controversy between them and John Wilson should also be settled.

They allege "that thereupon it was verbally agreed between these defendants and the said John Wilson that he, the said John Wilson, would become responsible for the payment of said notes to the said Hansen, and would save and protect these defendants from any and all liability thereon, and thereupon these defendants consented to the settlement of the said other actions, which was accordingly done." They say that thereafter said action brought against Hansen, against them and others, was dismissed; that Wilson purchased the mortgaged property in pursuance of said agreement, and paid Hansen the remainder of the judgment, not as surety, but in pursuance of said agreement.

On the first day of November, 1892, a stipulation in writing was entered into and signed by all the parties concerned, wherein all the litigation other than the case of Hansen against these defendants and others, was settled.

It is not claimed that there is any reference in said stipulation to the case of Hansen pending on the answer of these defendants.

Their contention is that it was agreed between them and Wilson, as alleged, and that, therefore, Wilson has no right to charge them with contribution. Here again the evidence is quite conflicting, but we think, the defendants have failed to establish, by a preponderance of the evidence, the burden that rests upon them. It will serve no good purpose to set out or discuss the evidence, it is sufficient to say that we think the defendants have failed to establish the alleged agreement by a preponderance of the evidence.

The judgment of the district court is **AFFIRMED**.

N. GADMER V. MARY ELLEN CORCORAN LENT AND C. E. LENT
Appellants, and **THE DES MOINES INSURANCE COMPANY.**

AGENCY—EVIDENCE—Payment of Liquor Debt.

Appeal from Pocahontas District Court.—HON. LOT THOMAS, Judge.

SATURDAY, APRIL 10, 1897.

ACTION to foreclose mortgage. The defendants, in their answer, allege that part of the consideration was the purchase of intoxicating liquors, and that the plaintiff is not a *bona fide* holder of the note and mortgage. The loss occasioned by the burning of the house was paid by the insurance company into court, to be disposed of in the decree. There was a decree for plaintiff, as prayed, and defendants Lent appeal.—*Affirmed*.

Botsford, Healy & Healy for appellants.

Stevenson & Lavender for appellee.

LADD, J.—The defendants Mary Ellen Corcoran Lent and G. E. Lent, executed the note for two hundred and fifty dollars, on which this action is brought, to G. E. Hughes, and the mortgage on their house and lot securing the payment thereof, November 11, 1893. The house was insured, and the loss, if any, made payable to the mortgagee as his interest might appear. It burned in 1894, and the loss adjusted at one hundred and seventy-five dollars, was left, in pursuance of a stipulation, with the clerk, to be disposed of in the decree. The defendants claim that, of the consideration, one hundred and forty-seven dollars was for the purchase of a stock of intoxicating liquors at Tripp, S. D., while the plaintiff says that the entire consideration was for money loaned and the expenses of preparing the papers. The evidence conclusively shows that G. E. Hughes did not own the stock at Tripp, but that it was the property of Samuel Hughes. It is insisted, however, that G. E. Hughes acted as the agent of Samuel. Undoubtedly, he talked with Lent about the purchase, but the evidence shows that Lent wrote to Samuel about the opportunities at Tripp, and of the extent of the business there, and went out to see him. As soon as he had arranged for the money, he telegraphed to Samuel to turn the goods over to Ollie, and come to Fonda on the first train. When the loan was completed, G. E. Hughes retained the one hundred and forty-seven dollars Lent had agreed to pay his father, Samuel Hughes, and paid it to the latter. The evidence regarding these transactions is conflicting, but it establishes this state of facts when fairly considered. The one hundred and forty-seven dollars was borrowed for and used to buy the stock, but the stock was not owned by G. E. Hughes, and was not bought of him, and the evidence does not show that he was the agent of Samuel Hughes in the transaction. This conclusion renders it unnecessary to consider the other questions argued.—AFFIRMED.

MARY A. MORSE, *et al.*, v. THE CITY OF DUBUQUE, *et al.*, Defendants, WILLIAM WHITE AND W. D. WHITE, Appellants.

Appeal. A finding by the court as to the true location of a street will not be reversed on appeal, although the evidence is not harmonious, where, after eliminating objections to the admissibility of the evidence not well taken, the court's conclusion cannot be said to be doubtful.

Appeal from Dubuque District Court.—HON. J. L. HUSTED, Judge.

THURSDAY, MAY 13, 1897.

THE plaintiffs are Mary A. Morse and some nine others, who own all the land abutting on the north side of O'Neil street, in the city of

Dubuque. William White and Emily D. White are defendants, and own all the land abutting on the south side of said O'Neil street. O'Neil street intersects, at a right angle, with Booth street. The City of Dubuque, Dodson & Cousins, and D. W. Linehan are also defendants. The city let to Dodson & Cousins and Linehan a contract to improve Booth street, which improvement included curbstones along the sides of the street. In pursuance of the contract, they were about to set curbstones along the west line of Booth street, where it crossed O'Neil street, so as to interfere with its use as a street at the place where it is opened. A temporary injunction was granted, and issues were thereafter formed so as to present the question whether O'Neil street was located where it now appears to be, or thirty-three feet north of there. The controversy involves, as between plaintiffs and defendants William and Emily D. White, the ownership of thirty-three feet in width of land along the street. The street, wherever located, is conceded to be the correct boundary, so that the only question of fact is the correct location of the street, across which, when properly located, there is no claim of a right to set curbstones. On final hearing the district court made the temporary injunction perpetual, and made the following findings and order: "It is further ordered, adjudged, and decreed that the north line of O'Neil street is fifty-nine and one-half degrees west, three hundred and fifty-two feet from the southwesterly line of West Third and Booth streets, and the south line of said O'Neil street is fifty feet south of said north line. Said O'Neil street is decreed to be fifty feet in width, and is one of the public streets of the city of Dubuque." Defendants William and Emily D. White appealed.—*Affirmed.*

G. A. Barnes for appellants.

P. S. Webster for appellees.

GRANGER, J.—The record is a plain affirmative showing of the correctness of the conclusion of the district court in fixing the location of the street. The evidence is not harmonious, but when some objections to the admissibility of evidence, not well taken, are out of the way, the conclusion cannot be said to be doubtful. O'Neil street was established by dedication in writing by M. M. Trumbull and wife and B. J. O'Neil and wife on the twenty-ninth of January, 1878. Trumbull was the owner of lot No. 8, and O'Neil of lot No. 9, of mineral lot No. 159. There was some dispute as to the precise location of the line between their lots, and a survey was made showing their respective lots, with O'Neil street between them. On lot 8, as it appears on the plat, is the following, signed by M. M. Trumbull and his wife: "This survey and plat of lot 8 of mineral lot 159 and of O'Neil street is made in accordance with our wishes, and we hereby dedicate to the public the ground for the street thereon laid off for street purposes, and that only." Precisely the same dedication is

made by O'Neil and wife on the face of lot 9 on the plat. The engineer who made the survey and plat was a witness for plaintiff, and it appears that O'Neil and Trumbull were in dispute about some thirty-odd feet of the land, and the engineer divided the disputed land between them, and located the street on the line thus fixed. Both parties were present, and acquiesced in what was done, and this fact may account for the peculiar language and manner of the dedication. After the survey, the plat was made and recorded by their instruction. In locating the street the engineer staked the line for fences on the sides of the street, and the fences were so placed, substantially, and the street was thereafter occupied and used. While there is considerable evidence, arising from deed descriptions, and otherwise, to show that the street is not directly on the line between lots 6 and 9, as originally understood or described, there is no room to doubt that it is where the dedicators placed it and where it was accepted. There is considerable evidence, much of which is incompetent, as showing a dispute between different parties, since about 1880, and among the number M. M. Trumbull, who petitioned for a re-survey. Nothing in such evidence, if all is considered, outweighs the conclusiveness of the facts we have stated. Pages could be devoted to an effort to explain different parts of the evidence, but no good could result from it. With this conclusion upon the facts, there is no disputed legal proposition for consideration. The judgment is **AFFIRMED**.

NATHAN CLAFLIN, *et al.*, Appellants, v. ARNOLD CLAFLIN, *et al.*

Evidence. A finding that a deed to two of the grantor's sons was not void for mental incapacity or undue influence, is sustained by evidence that he made a substantially similar disposition of his property by a will previously executed when his mental competency was unquestioned, and that he repeatedly stated that he intended to give the land to them, and that they had lived with him for many years.

Appeal from Hamilton District Court.—HON. B. P. BIRDSALL, Judge.

THURSDAY, MAY 20, 1897.

ACTION to set aside a deed of conveyance of land. Decree for defendants, and the plaintiffs appealed.—*Affirmed*.

D. C. Chase for appellants.

Hyatt & Hyatt for appellees.

GRANGER, J.—John Clafin died the first of October, 1892, his wife having died some six months before. At the time of his death he was about eighty-three years of age. On the fifth of July, 1892, he made to the defendants, Arnold and Ed. Clafin, his sons, a deed of all his real estate, consisting of about eighty-one acres. The consideration for the conveyance was the agreement of Arnold and Ed. to support him during his life, including the expenses of his last sickness and burial. By the terms of the deed the grantor reserved the possession of the land during his lifetime. The plaintiffs are a son and two daughters of John Clafin, who ask that the deed be set aside because the grantor, at the time of making the deed, was of unsound mind, and incapable of making such a conveyance; and also because of undue influence used by the defendants to obtain the deed. Much of the testimony relied on by appellants must be disregarded, because incompetent under Code, section 3639. Viewing the case in the light of competent evidence only, there is little to support either the claim of incompetency or undue influence. It seems to us that the most reliable evidence in the case shows Mr. Clafin, at the time the deed was made, to have been a man competent to dispose of his property by deed or testamentary act. The testimony of those who were with him most, and knew him best, including most of the evidence of a disinterested character, established that fact. This is supplemented by the fact that the disposition of the property, as made, was in accord with a long-settled purpose. In 1887, at a time when no one could regard him as incompetent to make such a disposition of property, he executed a will, by which he essentially made the same disposition of all his property. At that time his wife was living and he gave it all to her, for her use and benefit, with a right of disposition during his life, with a provision that all that should remain at her death should go to his sons, Arnold and Ed. Clafin. After the death of his wife, he made the conveyance in question. It is a strong showing of a well-settled purpose, long entertained, as between his children, to give his property to these two sons. This conclusion is strengthened by repeated statements that he intended to give the property to them. It is true that there is evidence of his having said that he intended to treat his children alike, but his acts, and his statements to others of his purpose, in accord with what he did, far outweigh any showing of a contrary intent. Besides these facts, it appears that Arnold had lived with him for many years,—some twenty-five. He has never been married, and is fifty-four years old. It is not too much to say that he appeared to have cast his lot at home with his parents. Ed. had lived at home some five or six years before the deed was made, and his father had often said he intended to give his property to the two boys. It is quite evident that the father thought the boys had done much toward acquiring the property. While the evidence is in conflict, we are agreed as to the conclusion, and the judgment will stand **AFFIRMED**.

F. K. WALLICK, Guardian, and F. K. WALLICK, Appellants, v. WILLIAM PIERCE.

Trial de Novo: RECORD ON EVIDENCE. Where an equity case is appealed for trial *de novo*, the abstract must show that it contains all the evidence offered, whether received or rejected by the lower court.

Appeal from Cedar District Court.—HON. WILLIAM P. WOLF, Judge.

SATURDAY, MAY 22, 1897.

SUIT in equity to enjoin defendant from trespassing upon the property of one John M. May, and from removing stone therefrom. The defendant denied the plaintiff's ownership of the land, from which he had removed stone, and averred the fact to be that the land which May claimed to own, and from which he removed the rock, was a part of the bed of the Cedar river, which is a navigable stream. The case was tried to the court, resulting in a decree dismissing the plaintiff's petition, and they appeal.—*Affirmed*.

Wm. Treichler for appellants.

No appearance for appellee.

DEEMER, J.—This is an equity cause, triable here *de novo* if at all, and the abstract must show that we have all the evidence offered, received, or introduced. A statement that it contains all the evidence introduced and received is not sufficient, for we must have all the evidence offered, whether received or rejected by the lower court. *Reed v. Larrison*, 77 Iowa, 399; *Taylor v. Kier*, 54 Iowa, 645; *Tuttle v. Story County*, 56 Iowa, 816; *Marble Works v. Linesenmeyer*, 80 Iowa, 253; *Bank v. Ash*, 85 Iowa, 74. The statement made by appellant with reference to this matter is that "the abstract is a full, true, and complete one of all the evidence offered and received, as well as introduced and received." The evidence offered and rejected is not set out. We cannot try the case *de novo* and, as no errors are assigned, there is nothing to consider. *Reed v. Larrison, supra*. For the reasons first above stated, the judgment is **AFFIRMED**.

E. B. BROWN, Appellant, v. WILLIAM LAHART.

RESERVATION FROM DEED: *Evidence held to show.* In a suit to quiet title the plaintiff was the grantee named in a deed conveying the lot "except — feet off the east side of the same." The preponderance of the evidence showed that he had agreed that he would

not record the deed until this blank was filled with the width covered by a stairway, to be ascertained subsequent to the execution and delivery of the deed. *Held*, that a decree that the east four and a half feet of this lot, this being the width covered by the stairway was not conveyed by the deed, would not be disturbed.

Appeal from Monroe District Court.—HON. F. W. EICHELBERGER,
Judge.

TUESDAY, MAY 25, 1897.

ACTION in equity to quiet the title to lot 4, block 1, in the town of Melrose, Monroe county, Iowa, in the plaintiff, as against the defendant. Decree was rendered dismissing plaintiff's petition, from which he appeals.—*Affirmed*.

T. B. Perry for appellant.

Ed. Morrison and *J. R. Hurford* for appellee.

GIVEN, J.—The contention is as to the east four and one-half feet of said lot 4. Plaintiff claims under a deed duly executed by Jane A. Stoddard to him March 30, 1894, conveying "lot four (4), except — feet off of the east side of the same, and lot No. nine (9), all in block No. one (1), of the town of Melrose," which deed was recorded April 14, 1894. The defendant claims under a deed duly executed by Jane A. Stoddard to him April 20, 1894, conveying to him said four and one-half feet, which deed was recorded April 27, 1894. Plaintiff contends that, by said deed to him, all of said lot 4 was conveyed. Defendant contends that said four and one-half feet was not included in the sale to the plaintiff; that it was expressly reserved therefrom; that, the exact width of said strip not being known to the agent of Mrs. Stoddard, the blank was left as shown above, to be filled up by Mrs. Stoddard; that, she having returned the deed duly executed without filling the blank, it was delivered by her agent to the plaintiff, upon payment of the purchase price, in pursuance of an oral agreement that plaintiff would not file the deed for record until said agent could ascertain from the records the width of said strip, and insert it in the deed. The plaintiff denies that the purchase was of less than the whole lot, or that there ever was such an oral agreement, and herein we have the real dispute. On this issue of fact, the evidence is in irreconcilable conflict. We will not set it out, nor discuss it, as to do so will serve no useful purpose, and consume space unnecessarily. It is sufficient to say that, in our view of it, the preponderance is in favor of the conclusion that the plaintiff purchased said lot 4, less a strip on the east side thereof, equal in width to that covered by the stairway to the building next on the east; that that strip is four and one-half feet

wide; and that the deed was delivered with the agreement that the proper width should be written therein before the deed would be recorded.—*AFFIRMED.*

THE ST. PAUL & KANSAS CITY GRAIN COMPANY V. JOHN R. RUDD
AND A. Z. RUDD, Appellants.

PRINCIPAL AND AGENT: *Want of authority.* It is no defense to an action on a note that defendants delivered to a third person, by plaintiff's authority, a note secured by chattel mortgage, as collateral security for the note in suit, and that such third person collected the collateral note by foreclosure of the mortgage, where he had no authority from plaintiff to collect it.

Appeal from Crawford District Court.—HON. C. D. GOLDSMITH,
Judge.

WEDNESDAY, MAY 26, 1897.

ACTION on a promissory note. Defense that defendant John R. Rudd assigned and delivered to plaintiff a note against one S. E. Rudd for one thousand seven hundred and fifty dollars, secured by a chattel mortgage, executed by S. E. Rudd on a stock of merchandise in the town of Bell, in Crawford county, Iowa; that said note and mortgage were assigned as collateral security upon the note sued upon; and that plaintiff has taken possession of the goods covered by said mortgage, has sold the same and collected said collateral note, and it has thus been fully paid. In a reply plaintiff denies all of the allegations of the answer, except it admits that said one thousand seven hundred and fifty dollar note was turned over to P. W. Harding to secure the note sued upon and other claims. It denies that it ever had possession of the property covered by said mortgage, and denies that it ever had possession of the note and mortgage so turned over to Harding; that said note and mortgage was turned over to Harding to secure an indebtedness of seven hundred and fifty or eight hundred dollars, in addition to plaintiff's claim, which other indebtedness was to be paid out of the proceeds of the property covered by said mortgage before plaintiff's note was paid, and plaintiff has never received anything from the proceeds of said goods; that defendant John R. Rudd has approved and consented to the action taken by said Harding in the sale and disposition of said goods and their proceeds; that plaintiff never authorized said Harding to take an assignment of the note and mortgage from Rudd, and never ratified the taking of the same, and Harding had no authority to take the same. There was a trial to the court and a jury, and a verdict was on motion directed by the court against the defendants, upon which a judgment was entered. Defendants appeal.—*Affirmed.*

Shaw & Kuehnle for appellants.

Harding & Harding and *J. P. Conner* for appellee.

KINNE, C. J.—If it be conceded that Harding had authority to take the note and the mortgage securing it, the plaintiff cannot be held responsible for Harding's acts in seizing and selling the property under said mortgage, as it nowhere appears in the record that Harding had any authority from the plaintiff to collect this collateral note and mortgage. Such authority is expressly denied by plaintiff, and, in the absence of evidence, we cannot assume that Harding possessed it. If, then, Harding had no authority to collect this collateral note and mortgage, his acts in so doing, and in taking possession of the property covered by the mortgage, and in selling the same, cannot bind plaintiff, and constituted no defense to the note in suit. The court, therefore, properly directed a verdict for the plaintiff.—**AFFIRMED.**

ELIZA MYRICK V. G. H. SEGAR, Appellant.

CONTRACTS—DELIVERY NOT ESTABLISHED.

Appeal from Wapello District Court.—HON. ROBERT SLOAN, Judge.

WEDNESDAY, OCTOBER 6, 1897.

THIS is an action to recover the possession of a certain farm, of which plaintiff holds the legal title, and also to recover damages for a wrongful detention thereof. Defendant answered, admitting that plaintiff holds the legal title to said farm, and that he is in possession thereof, and alleges as defense that he is entitled to the possession of said farm, and to a conveyance thereof from the plaintiff, by virtue of a contract of purchase with plaintiff, and certain payments made and offered to be made by him thereunder. He asks, by way of cross-petition, for specific performance of the alleged contract, and for costs. Each party makes certain claims for a money judgment against the other. The case was transferred to and heard as in equity. Decree for possession was rendered in favor of the plaintiff, and, upon an accounting of the claims made by each against the other, judgment was rendered in favor of the defendant for two hundred and twenty-seven dollars and seventy-five cents, which judgment was made a lien upon the land in controversy. The issues will more fully appear in the opinion. Defendant appeals.—*Affirmed.*

Jaques & Jaques for appellant.

McNett & Tisdale and *A. O. Steek* for appellee.

GIVEN, J.—Counsel agree that the first and most important inquiry is whether a contract for the purchase and sale of this farm was entered into between these parties. For many years prior to 1892, the plaintiff, a widow, aged seventy-four years, resided upon the farm in question, consisting of one hundred and thirty acres, to which she added, by purchase, at thirty-five dollars per acre, three additional acres, during the summer of 1892. In the spring of 1893, the defendant, who had been reared in the neighborhood of this farm, returned from his home, in Kansas, and was married to the daughter of the plaintiff. It was arranged that the defendant and his wife should remain with the plaintiff in her home on the farm, in pursuance of which arrangement the defendant disposed of his property in Kansas. Plaintiff being advised by her sons to sell the farm, and live on the proceeds, and the defendant having disposed of his property in Kansas, they commenced negotiations for the sale of plaintiff's farm to the defendant. While terms were frequently discussed, it does not appear that an agreement was reached until in October, 1893. It is true that the negotiations had been such that, in anticipation of a purchase of the farm, defendant had made certain improvements thereon, and let the plaintiff have seven hundred dollars in money; but this was upon the express understanding that the improvements made up to a certain time were to be paid for, and the seven hundred dollars repaid, if they did not ultimately consummate a sale of the farm. We say, again, that it does not appear that the minds of these parties met as to the terms of a sale until about the fifteenth day of October, 1893. On that day, Mr. W. A. Nye was requested to and did, prepare a contract in writing between these parties, and also a deed from the plaintiff to the defendant, for the farm in question. The writing is as follows: "This agreement, made this fifteenth day of October, 1892, by and between Eliza Myrick, of Wapello county and state of Iowa, and George Segar of Wapello county and state of Iowa, witnesseth: That the said Eliza Myrick has this day sold her farm, situate in Wapello county and state of Iowa, consisting of one hundred and thirty-three acres, as described in the deed of conveyance of this date, to said George H. Segar, for the sum of forty hundred and five dollars; the said George H. Segar to have full possession, except as hereinafter provided. *First.* Said Eliza Myrick hereby reserves the use of so much of the house as is necessary for her household goods and the goods of her grandson, James W. Hull, during the time of her natural life, or so long as she may desire to live with said George H. Segar and his wife, Sarah M. Segar, as one family. *Second.* She shall have the privilege, at any time she may desire, to live by herself, and to have such a room for that purpose as they then agree upon for her to occupy. *Third.* It is hereby expressly agreed, that if said George H. Segar shall sell the said farm during the lifetime of said Eliza Myrick; or if, for any cause, she cannot remain or live with him, as above contemplated, then he agrees to pay her six hundred and fifty dollars; but if she voluntarily leaves or moves away, without

just and reasonable cause, from him, then he shall not be liable for said amount. *Fourth.* Said Eliza Myrick is to have pasture and stable room for the horse given her by Ada Hull. Witness our hands, this fifteenth day of October, 1892. [Signed] Eliza Myrick. G. H. Segar. Witness: W. A. Nye." This writing was signed by the parties, and the deed was executed and acknowledged by the plaintiff, on said fifteenth day of October, 1892. Immediately after the same was signed, a dispute arose as to the number of acres, and whether the sale was by the acre or for a gross sum. Defendant claimed that there was a discrepancy between the abstract and the deed as to the number of acres, and thereupon Mr. Nye, with the consent of both parties, retained the contract and deed, and took them home with him, to see if he could reconcile this discrepancy. The deed was returned to the plaintiff, and the contract was held by Mr. Nye until after the commencement of this suit. Mr. Nye testifies: "Neither of the instruments was ever delivered to the defendant to my knowledge;" and in this he is corroborated by the plaintiff, and is not contradicted by the defendant. The defendant testifies that Mr. Nye took the deed home with him, to see if he could find figures to explain the discrepancy as to the number of acres, and that the deed was returned to the plaintiff, with "17 acres" erased, and "20 acres" written over it. Defendant insisted upon having a survey, and only paying for the actual number of acres, and nothing further was done in the way of delivering the contract or the deed. Defendant afterwards made tender of performance of the contract on his part, as he claims it to have been made. There are many incidental facts and conditions that need not be stated, as it is already apparent that the real contention is, whether this written contract was delivered, so as to be binding upon these parties.

All prior negotiations culminated in this writing; therefore there was no prior oral agreement to bind the parties, by part performance or otherwise. We think it is entirely clear that, because of the differences that arose after this writing was signed, it was not delivered, and therefore did not become the mutual agreement of the parties, nor binding upon them. It follows from this conclusion that the defendant is not entitled to the relief asked in his cross-petition, and that plaintiff is entitled to a judgment for the possession of the farm.

II. Appellant contends that the judgment rendered in his favor on the accounting is too small, and that he is entitled to judgment for a greater sum. We will not extend this opinion by discussing the several items claimed by each party against the other. It is sufficient to say that, after a careful examination of the evidence with respect to each item, we are of the opinion that the amount allowed by the district court is ample. Our conclusion upon the entire record is that the decree and judgment of the district court is correct, and it is therefore **AFFIRMED.**

INDEX

ABATEMENT

TO

ASSAULT

ABATEMENT—See INTOX. LIQUORS; JUDG. ¹, ².

ACCEPTANCES—See CONTRACTS, ¹, ⁴; EVID. ².

ACCOMPLICE—See CRIM. LAW, ¹, ²².

ACTION PENDING—See INTOX. LIQUOR.

ADMINISTRATORS—See ESTATES, ².

ADVANCEMENTS—See ESTATES, ¹; EVID. ¹⁶, ⁴¹; PARTITION, ¹; SALES, ¹.

1. Testator signed notes as surety for his son, with the understanding that, if compelled to pay same, the amount should be deducted from the son's share of the estate. Some of the notes were paid by testator, who kept them as memoranda, and others were paid by his administrator. *Held*, that the sums so paid were advancements.—In re Estate of Pickenbrock, 81.
2. EVIDENCE—That no consideration was paid for a conveyance of land from father to son, and that the latter did not participate in the distribution of certain land of the father after his death, is evidence that such conveyance was intended as an advancement —*Idem*.

ADVERSE POSSESSION—See CO-TENANCY, ¹, ², ⁴.

AGENCY—See EVID. ¹⁴, ⁴⁶; PRIN. AND AGENT.

ALIBI—See CRIM. LAW, ², ³, ⁴⁶.

ALIENS—See ESTATES, ⁴, ⁶, ⁷, ⁸; WILLS, ¹, ⁴.

APPEAL—See EMINENT DOM ; JUSTICE OF PEACE, ¹; NEW TRIAL, ¹; PLEAD. ⁵; PRACT. SUP. CT.

APPRAISEMENT—See INSURANCE, ¹.

ARSON—See CRIM. LAW, ¹², ¹³, ¹⁴, ¹⁹.

ASSAULT.

A clerk who touches a customer, and requests her to enter another room, and there accuses her of taking an article, commits an assault, under the definition of the instruction, "an assault is the touching, or attempting to touch, the person of another in an angry, violent, or rude manner."—McDonald v. Franchere Bros., 496.

Small figures refer to subdivisions of Index. The others to page of report.

ATTORNEYS

TO

BANKS

ASSIGNMENT—See GEN. ASSIGNMENT, ¹, ², ³, ⁴; JUDGMENTS, ⁴; MORTGAGES, ², ⁷; WAIVER, ¹, ², ³, ⁴.

ATTORNEYS—See CONTRACTS, ²; GARNISH, ²; MAL. PROS. ⁵.

1. **Money Due Estate**—*Payment by Clerk to Attorney for Executor*—A final report of co-executors, L and M, was approved on "condition that said M pay over to the clerk of the district court" the sum in his hands as shown by the report. It was further ordered that L, "as executor of said estate, is hereby directed and empowered to proceed against the said M for the collection of said amount." L began attachment against M the next day, and the following day M paid said sum and the costs to the clerk, who entered on the court's order for payment, that he had received from M "the amount in his hands as shown by his report as executor, * * * pursuant to the foregoing order." On demand of L's attorney in the attachment suit, the clerk paid the three hundred and sixty-four dollars to the attorney, who failed to account for it. *Held*, that such payment was not justified, and the clerk was liable to the owner of the fund.—*Logan v. McCahan*, 241.
2. **Statutory Attorney Fees**—*Interest of Attorney In*—Prior to Act Eighteenth General Assembly, chapter 185, plaintiff's attorney had no interest in a judgment in favor of his client for attorney fees specially contracted for, in the absence of an agreement to that effect.—*Barbee v. Aultman, Miller & Co.*, 278
3. **PARTITION**—*McClain's Code*, section 4532, which authorizes, the taxation of an attorney fee in partition suits in which there is no contest, does not warrant the allowance of such fees in contested partition suits.—*Finch v. Garrett*, 381.

BAILMENT—See SALES, ².

BANKS—See CRIM. LAW, ²⁹, ³⁰, ³⁶, ⁴¹, ⁴²; PRIN. AND AGENT, ².

CORPORATIONS—*Liability as Stockholders*—A bank authorized by its charter to "discount bills, notes and other securities," has power to purchase shares of stock of a corporation in payment of a debt for which such stock was originally given as collateral security, and is liable thereon the same as any other owner of stock.—*Latimer et al. v. State Bank*, 162.

BASTARDS—See ILLEGITIMACY, ¹, ².

BILL OF EXCEPTIONS—See GARNISHMENT, ²; NEW TRIAL, ¹; PRACT. SUP. CT ¹, ², ³¹.

BILL OF LADING—See SALES, ², ⁴.

BILL OF SALE—See EVID. ⁴⁸.

BLANK INDORSEMENT—See EVID. ³⁸.

Small figures refer to subdivisions of Index. The others to page of report.

BREACH OF PROV. AND SEDUC. TO BROKERS

BONDS—See MULCT LAW, 1, 2; MUN. CORP. 6, 7, 8, 9, 11, 12; PRAC. SUP. CT. 20; PRIN. AND SURETY, 1; STATUTES; WILLS, 6.

BOOKS OF ACCOUNT—See PRAC. SUP. CT. 22, 23, 24.

BREACH OF PROMISE AND SEDUCTION.

1. **Pleading**—In an action on breach of promise to marry, allegations of seduction by means of such promise may be pleaded merely in aggravation of damages, and do not subject the complaint to the charge of embracing two causes of action.—*Geiger v. Payne*, 581.
2. **Damages**—A verdict for sixteen thousand dollars for plaintiff in an action for breach of promise to marry, is not excessive where defendant is shown to be worth from fifty thousand to seventy-five thousand dollars, and the evidence tends to show that plaintiff, relying upon such promise, allowed him to seduce her.—*Idem*.
3. **SAME**—An instruction that the jury on the trial of an action for breach of promise to marry might consider, in estimating plaintiff's damages, the money value of the advantages of a home and domestic establishment of a kind suitable to the wife of a person of defendant's situation in life, is not erroneous where defendant is shown to be worth from fifty to seventy-five thousand dollars.—*Idem*.
4. **Evidence—ADMISSIONS OF DEFENDANT**—In an action for breach of promise to marry, defendant's statements to a third person that he was between two fires, and did not know whether to marry plaintiff or another woman, was admissible to show that he had a marriage with plaintiff under consideration, though made after the alleged breach of promise.—*Idem*.
5. **SAME**—Letters couched in affectionate terms, written by defendant, to plaintiff in an action for breach of promise to marry, telling her about his business affairs and explaining his relations with another woman, are admissible where defendant denies the promise, and may be considered by the jury as bearing upon the purpose with which such statements are made.—*Idem*.

BROKERS—See SALES, 6, 7, 8.

1. **Commissions**—A real estate broker is not deprived of his right to commissions for procuring a purchaser, by the fact that the latter procured the deed to be executed to a third person.—*Anderson & Ellis v. Wedeking*, 416.
2. **Jury Question**—Plaintiffs brought suit to recover their commission for furnishing a purchaser for real estate, alleging, but not proving, fraudulent conduct on the part of the defendant.

Small figures refer to subdivisions of Index. The others to page of report.

CONSPIRACY

Defendant did not deny the agreement, nor that plaintiffs furnished the purchaser. There was a conflict as to what was to be paid for commission. *He/d.* that the plaintiffs' cause of action should have been submitted to the jury.—*Idem.*

BUILDING CONTRACT—See CONTRACTS, ², ³.

BURGLARY—See CRIM. LAW, ²², ²³, ²⁴, ²⁵.

BY-LAWS—See INSUR. ², ³, ⁴.

CARRIERS—See SALES, ², ⁴.

CLAIMS—See ESTATES, ¹⁰, ¹¹.

CLERK OF COURT—See ATTORNEYS, ¹; PRAC. ¹².

COMMISSIONERS—See RAIL. ¹⁰.

COMMISSIONS—See BROKERS, ¹, ²; SALES, ⁶, ⁷, ⁸.

COMPROMISE—See EVID. ²².

CONFLICT OF LAWS—See ESTATES, ⁸; STOCKH. LIABILITY, ².

CONSIDERATION—See CONTRACTS, ², ¹⁰.

CONSPIRACY.

1. A conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give a right of action —*Beechley v. Mulville*, 602.
2. **Insurance**—Insurance is a commodity within McClain's Code, section 5454, prohibiting the formation of combinations or confederations between individuals or corporations to regulate or fix the price of "oil, lumber, coal, * * * or any other commodity."—*Idem.*
3. **RATE COMPACT**—A compact between local insurance agents in a city to fix the rates upon all risks therein, imposing certain penalties for taking of risks at less rates than those fixed by the association, is within the inhibition of McClain's Code, section 5454, forbidding the formation of combinations or confederations to regulate the price of any commodity.—*Idem.*
4. **Removal of Agent Under**—A local insurance agent who was a party to a compact within the inhibition of McClain's Code, section 5454, against the formation of combinations to regulate the price of commodities, cannot recover damages from the other members of the compact, and the insurance company for the withdrawal of the agency from him because of his violation of the compact agreement, where the withdrawal is in pursuance of a provision of the compact imposing such penalty for a violation of its provisions, and the company had the right to withdraw its agency at pleasure. He lost nothing but the agencies which the contract gave him. As the compact was illegal,

CONTRACTS

he lost nothing but an illegal business, made so by a conspiracy to which he was a party.—*Idem*.

CONSTITUTIONAL LAW—See MUN. CORP. ⁶, ⁷, ⁸, ¹⁰, ¹¹, ¹²; PARTY WALLS, ¹.

CONTINUANCES—See PRACT. ², ⁴, ⁶.

CONTRACTS—See page 749; EVID. ¹¹; INSUR. ¹⁵; MORTGAGES, ², ⁷; PARTY WALLS, ², ⁵; SALES, ¹¹; SPECI. PERFORMANCE; WAIVER, ¹, ², ³, ⁴; WARRANTY.

1. **Agreement to Cancel—Evidence**—Defendant refused to make a third acceptance until he learned the state of his account with the drawer, and was furnished with a statement showing a balance of two thousand nine hundred dollars against him, after crediting him with two prior acceptances of one thousand dollars each. Thereafter he agreed with plaintiff, who held the prior acceptances, that he would accept for two thousand five hundred dollars, "but not to exceed that," and before such acceptance was signed, he reminded plaintiff that he had the two prior acceptances, and in reply plaintiff stated that they would be "taken care of." Plaintiff had previously permitted defendant to renew the prior acceptances, and one of them was about to fall due. *Held*, insufficient to justify a finding that plaintiff agreed to cancel the two prior acceptances.—*First National Bank v. Booth*, 333.
2. **Building Contract—EXTRAS**—The owner may contract with the sub-contractor for extras, without regard to the provisions therefor in the written agreement between the owner and the principal contractor.—*Foley & Paul v. Hotel Association*, 272.
3. **Consideration**—The furnishing of extra material and labor by a sub contractor at the direction of the owner, creates a contract on a sufficient consideration to render the owner liable for the extras.—*Idem*.
4. **Construction of Contracts**—Unconstitutional provisions of an act may be considered in construing other provisions of the same act which are confessedly valid.—*Swift v. Calnan*, 206.
5. **SAME**—A continuing contract for the sale of ice, made August 8, provided that all money due to the buyer on re-sale of ice delivered to it on and after August 1, should be assigned to the seller for security, and that the seller was to furnish out of the money so assigned enough to pay freight on "the ice so furnished," not to exceed a certain sum per month. *Held*, that the contract did not require the seller to pay freight on the ice furnished after August 1, but before date of the contract.—*C. R. I. & P. R'y Co. v. Haywood & Son*, 392.

CONTRACTS Continued

6. **SAME**—An agreement by a president of a bank with one who has just accepted a draft for two thousand five hundred dollars, payable to the bank, to see that two prior drafts for one thousand dollars each, which are not yet due, "are taken care of," is simply an agreement for further indulgence on such prior acceptance, and not an agreement that the new acceptance shall be applied to their payment.—*First National Bank v. Booth*, 833.
7. **AMBIGUOUS CONTRACT**—Mulhall Bros. recovered judgments against claimant. They arranged to have him deed some land on which their judgments were liens to a stranger who assumed all liens. Another judgment, also a lien on the land, was obtained against plaintiff by one Wilts. Mulhall Bros. agreed by a writing to "*release* all personal judgments and liens of record against the land, only, as more fully shown" by an exhibit which merely set out certain mortgages and judgments held by Mulhall Bros. against plaintiff. It also provided that all liens and judgments were to remain a lien. Plaintiff paid off the Wilts judgment and sought to recover therefor, on said contract, at law. *Held*:
 - a. The contract did not cover the Wilts judgment.
 - b. The clause *releasing* plaintiff from all personal judgments and liens is, apparently, a limitation upon the clause that all judgments should remain liens.
 - c. The contract was so ambiguous as that Mulhall Bros. should have been allowed to show that the grantee had received a release of the Wilts judgment before they signed said contract, and that they knew this before signing.—*Wilts v. Mulhall Bros.*, 458.
8. **DISSOLUTION OF INSURANCE AGENCY**—An agreement between persons in the business of a fire insurance agency by which one of them sells his interest in the agency to the others, agreeing not to apply for nor accept specified companies, with the distinct understanding that he does not sell his good will in any "of the business or renewals now on the books of the agency, but reserves the full right and privilege of soliciting, securing, and writing any of the same," entitles such member to issue policies in place of those expiring as well as those in renewal of policies.—*Lantz v. Ryman*, 348.
9. **CORPORATIONS**—An agreement by one who turns over to an attorney certain judgments in favor of a corporation for collection, that the attorney shall have one-half the amount collected, binds the corporation.—*Barbee v. Aultman, Miller & Co.*, 278.

CONTRACTS Continued

10. **Evidence**—A medical examiner appointed by a life insurance company under an agreement by the company to pay him a specified amount for each applicant examined, is not affected by a provision in a subsequent contract between the company and its general agent, requiring the latter to pay for all medical examinations out of a certain per cent of the first year's premiums allowed him for that purpose, nor by the fact that the agent, after the services were rendered, furnished the company with a memorandum of unpaid bills which did not include one for medical examinations, nor by a settlement between the company and its agent by which the latter agreed to pay the bills for medical examinations; and evidence of such matters is inadmissible against him in an action against the company to recover for his services, where he was not aware of such provision or of the transactions between the company and its agent.—*Hannawalt v. Equitable Life Assurance Society*, 667.
11. **Forfeiture of Land Contract**—NOTICE—A contract for the sale of land provided that the vendee should pay the price on March 1, 1895, and that, "if said amount is not punctually paid, according to the foregoing agreement, and on the day they severally become due, time being the essence of this contract," the vendor "is to have the right to declare this contract null and void, and all payments made thereunder and all improvements made thereunder forfeited, by giving the second party due notice thereof, and for thirty days prior to declaring the same forfeited." *Held*, that such contract could not be forfeited for failure to pay the price on March 1, 1895, until after thirty days' notice by the vendor to the vendee, that he elected to forfeit it, had been given, and continued failure of the vendee to pay within thirty days.—*Auxier v. Taylor*, 678.
12. **SAME**—On February 26, 1895, the vendee admitted in a letter to the vendor, that he was having difficulty in raising the money, but gave no intimation of intention to abandon the contract. The vendor, in reply, stated where the deed was; that the vendor could get it by making payment; that he considered the agreement forfeited, and asked if the vendee had any objection to let him know. *Held*, this was not the notice of forfeiture contemplated by the contract.—*Idem*.
13. **Parol Variance**—It appeared that the firm kept an expiration register, and that the terms "renewals" and "expirations" were used by insurance men interchangeably. *Held*, that parol evidence of contemporaneous conversations between the parties or subsequent statements by plaintiff, were not admissible to

CONTRACTS Continued

prove that he sold to defendants his interest in the expirations.—*Lantz v. Ryman*, 348.

14. **Public Polloy—AGENT'S BOND—Liquor Laws**—Where a foreign brewing company, in 1892, had an agency in Iowa for the sale of liquors therein, in the original packages, and neither the company nor its agent had any authority to sell liquors as required by the statute of such state, a bond executed in Iowa and delivered and accepted in Wisconsin and given by the agent to the company to account for the proceeds of the liquors sold, was void, under Code, section 1550, providing that all securities, etc., made in whole or in part for or on account of the intoxicating liquors so sold in violation of "this chapter" shall be void, etc., and act of congress, August 8, 1890, making liquors transported into any state, etc., for sale therein in original packages subject to the laws of such state, etc., to the same extent as liquors produced therein.—*Fred Miller Brewing Co. v. Stevens*, 60.
15. **Statute of Frauds**—An oral promise by one person to pay another for caring for a third person is not within the inhibition of the statute of frauds against oral promises to answer for the default or miscarriage of another, where the latter was *non compos mentis*, and no indebtedness was incurred by his estate; as a promise arising from an original consideration of benefit or harm moving between the contracting parties is not within the statute.—*Harlan v. Harlan*, 701.
16. **CONSIDERATION**—A promise to board and care for a third person whom neither of the parties is under legal obligations to provide for, is a valid consideration for the promise to pay for such board and service.—*Idem*.
17. **SAME**—Furnishing board and performing services in strict compliance with an oral agreement to board and care for one in consideration of an interest in real property takes the agreement out of Code 1873, section 3664, prohibiting the admission of oral evidence for the creation or transfer of an interest in lands except leases for a term not exceeding one year, by virtue of section 3663, providing that the former section does not apply where the purchase money, or any portion thereof, has been received by the vendor; as the term "purchase money" may mean property or labor performed.—*Idem*
18. **Waiver of Performance**—An owner who has without objection permitted a contractor for the construction of a steam-heating plant to make side connection for such plant instead of top connection as provided by the contract, is not entitled to a deduction from the contract price, of the amount which it

CONTRACTS Continued

TO

CO-TENANCY

would cost to change the connection from side to top.—*Fitts & Co. v. Reinhart*, 311.

19. **PERFORMANCE MADE IMPOSSIBLE**—A provision in a building contract that a certificate shall be obtained from the architect for all the payments, does not require the contractor to procure such certificate where the architect has been discharged by the owner.—*Idem*.

CONTRIBUTION—See **PRIN. AND SURETY**, 2.

CONTRIBUTORY NEGLIGENCE—See **MASTER AND SERVANT**, 2;
RAIL. 6, 7, 8, 9, 10.

CORPORATIONS—See **BANKS**; **CONTRACTS**, 9; **INSUR.** 2, 3, 4; **STOCK-HOLDERS LIABILITY**, 1, 2.

CORPUS DELICTI—See **CRIM. LAW**, 16, 17, 18, 19.

CORROBORATION—See **CRIM. LAW**, 1, 2.

COSTS—See **PARTITION**, 2; **PRACT. SUP. CT.** 10.

1. **Several Issues**—A plea in mitigation in an action for slander in accusing plaintiff of stealing cattle, which alleges that his general reputation for more than ten years has been that he was in the habit of stealing cattle, does not present an issue within Code, section 2934, providing that where there are several "issues," plaintiff shall recover costs on the issues determined in his favor and defendant on the issues determined in his favor; and though defendant prevails, in a sense, on that plea, because the verdict for plaintiff is nominal, he cannot recover the fees of witnesses called solely on mitigation, if the general verdict goes against him.—*McGuire v. Montross*, 20.
2. **SAME**—Defendant charged with two slanderous utterances, lost as to one and prevailed as to the other. Testimony adduced applied to both, and it was impossible to separate the applicability. *Held*, defendant is not, by said statute, entitled to recover half the costs.—*Idem*.

CO-TENANCY.

1. **Adverse Possession**—Possession under deeds from four of five tenants in common, purporting to convey the entire estate, is not such disseizin of the one who did not convey as will start the running of limitations, where grantors and grantees recognize that such co-tenant has an interest, and the grantee makes frequent efforts to buy that interest.—*Van Ormer v. Harley*, 150.
2. **TAX SALE AND TAX DEED**—A tax sale of lands at the instance of a tenant in common having possession of the premises, for the purpose of extinguishing the title of his co tenant, is

CO-TENANCY Continued TO COUNTIES

not, until the tax deed is made, such an ouster of the co-tenant as to make the tenant in possession liable to such co-tenant for rent.—*Idem*.

3. *Same*—Where the heirs of the co-tenant in possession take, after his death, a conveyance from the grantee in such tax deed, but assert no adverse claim against their ancestor's co-tenant by reason thereof, their possession is not such an ouster of such co-tenant as to render them liable to him for rent.—*Idem*.
4. *Same*—A sale of land for delinquent taxes and the issuing of a tax deed therefor in pursuance of a plan of one tenant in common in possession, and for his interest, to extinguish the title of his co-tenant, do not create any adverse right against the latter.—*Idem*.
5. **Abandonment by Co-tenant**—The rights of such co-tenant are not barred in equity by failure to take active steps for their enforcement, where he did not waive them and the person in possession knew of such rights and that they were not abandoned.—*Idem*.
6. **Improvements—PARTITION**—Though a tenant in common cannot, as a rule, make his co-tenant liable for improvements not consented to by such co-tenant, where the improvements increase the value of the land, and the possession of the tenant making the improvements is not wrongful, equity may allow for such improvements, in partition.—*Idem*.
7. **Rent for Occupancy**—A tenant in common is liable for rent if he lease the premises to a stranger, but is not liable to pay co-tenants who do not share the use of the premises, rent for his own occupancy unless he exclude the co-tenants from possession.—*Idem*.
8. **Rents and Profits**—A tenant in common out of possession who makes no objection to the improvements on the land made by his co-tenant in possession will not be allowed to share in the higher rent made possible by such improvements without paying a share of their cost.—*Idem*

COUNTIES—See SALES, 2.

1. **Sheriff's Fees—CARE OF PRISONERS**—Under Mc'lain's Code, section 5041, providing: "The sheriff is entitled to recover the following fees" (section 5056): "for boarding a prisoner, a compensation fixed by the board of supervisors, not less than fifty cents a day;" (section 5057) "for waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors;" and section

Small figures refer to subdivisions of Index. The others to page of report.

COUNTIES Continued

TO

CRIM. LAW

5063, providing that the sheriff is also entitled for attending courts, and for other services for which no compensation is allowed by law, to such an annual salary as may be fixed by the board of supervisors,—he is entitled, for washing for and waiting on prisoners, to a reasonable compensation outside of his salary.—*Hamill v. Carroll County*, 538.

2. **SAME**—Washing bedding used by prisoners, if necessary to keep the same in suitable condition for their use, is “washing for the prisoners” within McClain’s Code, section 5057, entitling the sheriff to remuneration from the county for services in waiting on and washing for prisoners; and that it was necessary will be assumed where it is ordered by the board.—*Idem*.
3. **SAME**—Mending the clothes of prisoners, if a necessary service for the proper keeping of the prisoners, is waiting on them within McClain’s Code, section 5057, entitling a sheriff to remuneration from the county for waiting on the prisoners.—*Idem*.

COURTS—See **TAXATION**, ¹.

COVENANTS—See **MORTGAGES**, ², ⁷; **WAIVER**, ¹, ², ³, ⁴.

CRIMINAL LAW—See **PRACT. SUP. CT.** ⁷.

1. **Accomplice**—See *post*, ²²—Under Code, 1873, section 4559, providing that the corroboration of an accomplice is not sufficient, “if it merely shows the commission of the offense or the circumstances thereof,” a charge that “the corroboration is not sufficient if it merely shows that the offense has been committed by some person” was insufficient, in omitting reference to “the circumstances.”—*State of Iowa v. Smith*, 656.
2. **Alibi**—See *post*, ⁴⁶—An instruction cautioning the jury in a criminal trial that an alibi is easily manufactured and the testimony concerning the same should be carefully considered, in not erroneous.—*State of Iowa v. Watson*, 651.
3. **REBUTTAL**—As the burden of proving an alibi is on the defendant, evidence in support thereof may be rebutted.—*Idem*.

Arson—See *post*, ¹², ¹³, ¹⁴, ²⁰.

Burglary—See *post*, ²², ²⁴, ²⁵.

Circumstantial Evidence—See *post*, ¹⁵, ¹⁷.

Corpus Delicti—See *post*, ¹⁶.

Corroboration—See *ante*, ¹; *post*, ²².

Cross Examination—See *post*, ²⁰, ²¹.

CRIM. LAW Continued

Election Crimes—See *post*, ³¹, ³², ⁴².

4. To render judges of election guilty of wilfully refusing the vote of an elector under Code 1873, section 4004, the offer to vote must have been made to defendants while acting officially as judges of election, and an offer made before the election board was organized is not sufficient.—*State of Iowa v. Clark*, 685.
5. **TEST OATH**—A refusal to receive a vote after refusing the prescribed test oath is just as much a violation of law as though a ballot offered after taking such oath had been refused, and, to constitute a compliance with the law, it is not required that the person who offers his vote shall take the oath before some other official qualified to administer it.—*Idem*.
6. **"WILFUL" DEFINED**—Whether the refusal of a vote was with or without just grounds for believing the refusal to be lawful is wholly immaterial in determining whether or not the refusal was wilful within Code, 1873, section 4004, making judges of election guilty of an offense for wilfully refusing a vote of a person who complies with the requisites prescribed by law to prove his qualification.—*Idem*.
7. **Embezzlement—PUBLIC OFFICER**—The treasurer of the commissioners of pharmacy elected by the commissioners, authorized by Code, Nineteenth General Assembly, chapter 137, to receive certain license fees, is not a public officer within Code, 1873, section 3998, making the conversion by a public officer of funds received by virtue of his office an embezzlement, as the power conferred upon the commissioners to make by-laws and all necessary regulations for the proper fulfillment of their duties, without expense to the state, did not authorize them to appoint a treasurer.—*State of Iowa v. Spaulding*, 639.
8. **Statutory Recognition**—Laws, Nineteenth General Assembly, chapter 137, providing that certain license fees to be collected by the pharmacy commission shall be paid to "the treasurer of the commission of pharmacy," is not a recognition of the treasurer as a public officer.—*Idem*.
9. **SAME**—To constitute a public officer within Code, 1873, section 3908, providing that any public officer within the state who converts to his own use any money that may come into his hands by virtue of his office shall be guilty of embezzlement, the office itself must be created by the constitution or authorized by statute. If authorized by statute its creation may be by direct legislative act, or it may be created by an official board or commission created by the legislature with power to create such an office. His appointment must not only have been made or authorized by the constitution of the state or legislative act, directly or indirectly, but his duties must either be

CRIM. LAW—EVID. Continued

- prescribed by the constitution or statutes of the state, or necessarily inhere in and pertain to the administration of the office itself. The duties of the position must embrace the exercise of public powers or trusts; that is, there must be a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public.—*Idem.*
10. SAME—An oath of office, salary or fees, and a fixed term of duration or continuance are, generally, though not necessarily, attached to a public office.—*Idem.*
11. TITLE TO MONEY EMBEZZLED—*Loan Agent*—Defendant was employed by prosecuting witness to procure a loan on mortgage. He obtained the desired sum under an agreement that it should be delivered to prosecuting witness, on execution by him of a first mortgage. Prior to such execution he had appropriated the money to his own use. *Held*, that as the money, when appropriated, belonged to the lender, and not to the prosecuting witness, defendant was not guilty of embezzling the money of such prosecuting witness.—*State of Iowa v. Cooper*, 146.
12. EVIDENCE—See *ante*, ³—ARSON—On the trial of one charged with burning his barn which was in possession of defendant's brother as lessee, on November 24, a witness testified that in the previous October defendant told witness that he was going to get even with H and his brother. *Held*, that it was not error to overrule an objection to the question, "what, if anything, did he say about dynamite?" and permit the witness to testify that "he asked me to come out to his place, and asked me if I understood the use of dynamite, and I told him that I did."—*State of Iowa v. Miller*, 692.
13. THREATS—In an arson case, threats made by accused against the person or property of the prosecutor may be shown, not only to prove malice, but to connect the accused with the commission of the offense.—*Idem.*
14. *Same*—And it was not error to admit evidence that the defendant said he was going to get even with H and his brother, and that he would give witness twenty-five dollars, and all witness had to do was to touch a match.—*Idem.*
15. CIRCUMSTANTIAL EVIDENCE—*Motive*—If an act or a declaration of an accused occurring prior to the commission of the crime is admissible on the question of motive, it may be shown by circumstantial evidence.—*State of Iowa v. Smith*, 656.

CRIM. LAW—EVID. Continued

16. **CORPUS DELICTI—Arson**—The phrase "*corpus delicti*" includes two elements: *First*, that a certain result has been produced, as that a man has died, or a building has been burned, or a piece of property is not in its owner's possession; *second*, that some one is criminally responsible for the result.—*Idem*.
17. **Circumstantial Evidence**—Direct evidence is not indispensable to establish either of the elements of the *corpus delicti* in a criminal trial, but when circumstantial evidence is relied on it must be of the most cogent and irresistible kind.—*Idem*.
18. **ELEMENTS OF**—In an arson case, to warrant conviction, there must be satisfactory proof that the building was feloniously and maliciously burned by some one and not accidentally burned.—*Idem*.
19. **Rule Applied**—The existence of the *corpus delicti* may be found by the jury where the evidence showed that early in the evening of the night of the fire a rain storm commenced which changed to sleet and finally to snow; that defendant had been making threats against both his brother and H, owner and tenant, respectively; that he made contradictory statements as to his whereabouts on that evening; that he was last seen on such evening about 10 or 10:30 o'clock, in F; that the barn burned was between F and his house and he could pass it on going home without going far out of his way; that on the forenoon of the same day he passed the barn and remarked to a companion about it and, in the same connection, said he was going to get even with the man who was using it; that as soon as the snow went off, which was within a week, footprints, similar in size and style to those made by defendant, were found leading from near the barn to or near the gate of defendant's premises; and that after defendant's preliminary examination he tried to intimidate some of the witnesses against him —*Idem*.
20. **CROSS-EXAMINATION**—On trial of an indictment of a banker for receiving money when insolvent, where defendant, to show want of connection with the transaction, testified that, on the morning of the day that the deposit was made, he left the town where his bank was located, and went to W, after promising to telephone his son, left in charge of the bank, if things did not look favorable, not to receive deposits, and that he sent that message, the court was not required to confine the cross-examination to what defendant did at W. It was proper to cross-examine as to any matter which tended, more fully, to disclose whether the want of connection asserted, existed.—*State of Iowa v. Eifert*, 188.

CRIM. LAW—EVID. Continued

21. *Same*—The court may, in its discretion, permit the county attorney to cross-examine the defendant, charged with burglary, who takes the stand in his own behalf, at considerable length with reference to his various places of residence, his going under assumed names, and his whereabouts at particular times.—State of Iowa v. Watson, 651.
22. DEGREE OF REQUIRED—A preponderance of evidence showing that a witness for the state was an accomplice of defendant, is sufficient to require her corroboration by other evidence tending to connect defendant with the crime charged, before he can be convicted. That she was an accomplice, need not be shown beyond a reasonable doubt.—State of Iowa v. Smith, 656.
23. EXCLUSION—*Harmless Error*—The exclusion of the question to a witness for the state, if he did not understand that he was to be given his liberty after testifying in the case, if erroneous, is not prejudicial, where the witness in answer to questions which were not objected to, explained that he was held under bond to appear as a witness in the case, and being unable to furnish it, was committed to jail.—State of Iowa v. Millmeier, 692.
24. OPINION EVIDENCE—One witness testified that he had noticed certain peculiarities in defendant's footprints, that certain tracks leading from the railroad to the burned building, and in the direction of defendant's property, had the same peculiarities. Another testified that there was a similarity between the tracks described by the former witness and those made by defendant, and that he thought they were the same. *Held*, that such evidence was not objectionable because it consisted of the witnesses' opinion.—*Idem*.
25. REBUTTAL—*Impeachment*—Testimony that defendant, charged with burglary, was seen on the day of the burglary at a certain place is admissible to impeach his testimony that he was never in such place, and also in rebuttal of his claim that he was in another place at or about the time the crime was committed.—State of Iowa v. Watson, 651.
26. RELEVANCY—Evidence that on January 29, after the fire, witness heard defendant say to a companion that he was smart enough and sharp enough to cover up his tracks, and that when this blowed over he would open up the battle, was not admissible, when the witness gave only the one sentence, and did not pretend to know what the conversation was about and there was nothing to show that the defendant's statements related either to the offense charged or to those whose property was burned.—State of Iowa v. Millmeier, 692.

CRIM. LAW Continued

27. *Same*—The state sought to show that defendant, charged with poisoning her husband, was connected with a shooting of the husband which occurred before he died of poison. There was a trial as to the shooting at which the husband, *testified for the state*, identifying another than his wife as his assailant. *Held*, this evidence of the dead husband might be introduced by the wife, on her trial for poisoning.—State of Iowa v. Smith, 656.
28. **Forgery**—An instrument reading, "12 hogs 2730. H Barnes," does not on its face create, or purport to create, any pecuniary demand or obligation nor any right or interest in or to any property whatever, within Code, 1873, section 3917, defining forgery as falsely making, with intent to defraud, any instrument in writing, being or purporting to be an act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is or purports to be created.—State of Iowa v. Burling 681.
29. **Fraudulent Banking**—See *ante*, ²⁰; *post*, ²⁴, ⁴¹, ⁴²—A banker's son and employe received a deposit when the insolvency of the bank was known and an hour or two before it finally closed. He received this deposit contrary to a telephone message from the banker to take no more deposits. When the banker reached home he having knowledge that the deposit had been received, made no effort to, and failed to return it, and four days later included same in a general assignment for the benefit of his creditors. *Held*, the banker himself is guilty of the offense of receiving and accepting a deposit knowing himself to be insolvent.—State of Iowa v. Eifert, 188
30. **TRUST FUND**—It is no defense that the depositor might pursue the deposit as a trust fund.—*Idem*.
31. **Harmless Error**—See *ante*, ²²—Judges of election cannot complain, on appeal from a conviction under Code 1873, section 4004, for wilfully refusing a vote of a person who complied with the requisites prescribed by law to prove his qualifications, of an instruction which requires that the refusal shall have been without just grounds for believing it to be wilful, as the error is favorable to them.—State of Iowa v. Clark, 685.
- Impeachment**—See *ante*, ²².
- Included Offenses**—See *post*, ⁴⁰.
32. **Indictment**—An indictment for burglary, charging that the building broken and entered was the office of a certain "company" need not state whether the company is a corporation or partnership.—State of Iowa v. Watson, 651.
33. **SAME**—An indictment charging defendant with breaking and entering a building with the intent to commit a rob-

CRIM. LAW Continued

- bery need not set out the elements of the intended robbery.
Idem.
84. OWNERSHIP—*Burglary*—Proof of occupancy of a building is sufficient to establish an allegation of ownership in an indictment for burglary.—*Idem.*
85. *Same*—An allegation in an indictment for burglary that the building burglarized was the office of a certain railroad company was sustained by proof that the building, though not owned by the company, was occupied by it, since Code, 1873, section 4302, provides that an erroneous allegation with reference to ownership, is not fatal.—*Idem.*
86. FRAUDULENT BANKING—An indictment for fraudulent banking which charges that the banker accepted a deposit from a person named, sufficiently states who was injured, and the owner of the deposit. Code, section 4305.—*State of Iowa v. Eifert*, 188.
87. UTTERING—An averment in an indictment for uttering a forged instrument which is not on its face the subject of forgery, that the instrument was designed, meant, and intended to create a legal liability against certain persons, brings the instrument within Code, 1873, section 3917, defining forgery as the falsely making, altering, forging or counterfeiting, with intent to defraud, any instrument in writing being or purporting to be the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever, is or purports to be created, as it does not matter whether the instrument if true would have created a legal liability or not.—*State of Iowa v. Burling*, 681.
88. INSTRUCTIONS—See *ante*, ²; *post*, ⁴¹—CONFLICTING—*Degree of Proof*—A portion of a charge in a criminal case, authorizing the determination of certain facts in the case by a preponderance of evidence, is prejudicial, notwithstanding the jury were told in other portions of the charge that they must be satisfied from the evidence, beyond a reasonable doubt, of every material allegation of the indictment, before they could convict.—*State of Iowa v. Clark*, 685.
89. ELECTIONS—*Refusing Vote*—The court charged that, in order to convict of refusing a vote it must be shown that the voter had complied with all requisites provided by law necessary to make it the duty of the judges to receive his vote, or that he offered to comply therewith and was prevented by the judges, or that after he offered to comply with all such requisites, defendants wilfully refused to receive his vote.
Held, error, for the reason that under this charge the jury

CRIM. LAW Continued

- might find defendants guilty whether a vote was offered them at a proper time, or not.—*Idem*.
40. INCLUDED OFFENSES—Since Code, 1873, section 3849, provides that all murder perpetrated by means of poison is murder in the first degree, a defendant charged with poisoning is guilty of that offense, or of nothing; and consequently it is not necessary, on his trial, to charge in regard to different degrees.—*State of Iowa v. Smith*, 656.
41. FRAUDULENT BANKING—*Ratification and Acceptance*—On trial of a banker for receiving deposits when insolvent, it is proper to instruct that, though the deposit was received against the defendant's orders, if, on learning that it had been received, he placed it among the funds of the bank, he "knowingly accepted and received" it within the statute. Such instruction rests the acceptance on defendant's own acts, not on the ratification of the acts of others.—*State of Iowa v. Eifert*, 188.
42. *Construed Together*—An instruction on trial of a banker for receiving deposits when insolvent, that it is enough that the deposit, though not received by him personally, was received under his authority, is not error, though the evidence is, that it was received against his order, where such charge is but part of the instruction, and aids in making plain a pertinent charge following, as to the defendant's accepting the deposit after it had been so received.—*Idem*.
43. PROVINCE OF JURY—The jury was told in regard to ascertaining whether defendants in doing what they did honestly intended to comply with the law, or wrongfully intended to disregard it, that "you should consider the interest defendants had in the election, as shown by the evidence, if any, and the feeling between the voter and defendants as shown by the evidence, and from all the facts and circumstances fairly considered by you, determine whether or not the doing of the act complained of, by the defendants, and proven by the preponderance of the evidence were done with an honest intention to comply with the law or with the wrong intention to disregard it, and having determined these questions from the evidence, you should render a verdict in accordance therewith." *Held*, erroneous because it appears to assume, and may have induced the jury to believe that the acts essential to the crime charged, had been shown by the evidence.—*State of Iowa v. Clark*, 685.
44. Jurors—SEPARATION—Under Code, 1873, section 4434, providing that the jurors in a criminal case may be permitted to separate

CRIM. LAW Continued

TO

DAMAGES

"except where one of the parties objects thereto," it is error, in a case tried on indictment, to permit a separation over defendant's objection.—State of Iowa v. Smith, 656.

45. **Jury Question**—A criminal case must be submitted to the jury where there is conflicting evidence as to all the facts essential to conviction.—State of Iowa v. Watson, 651.

46. **CONFLICT—Alibi**—Where the evidence as to an alibi was conflicting, the truth of that defense was for the jury.—*Idem*.

Misconduct of Counsel—See *post*, 48.

Motive—See *ante*, 15.

47. **Murder by Poison**—See *ante*, 37, 40—An instruction to find the defendant in a murder trial guilty if the jury find from the evidence, beyond a reasonable doubt, that she gave, or was a party to the giving of, a deadly poison to the deceased, of which he died, without requiring them to find that the poison was given feloniously, is erroneous.—State of Iowa v. Smith, 656.

48. **New Trial—MISCONDUCT OF COUNSEL**—Defendant was not entitled to a new trial because the state's counsel, in his closing argument to the jury, said: "There are witnessess who know that this man was not at home that night (referring to defendant's wife). We could not use her; could not if we wanted to; it would be an impossibility. The law throws that shield and guard around her. We could not use her, nor the defense has not seen fit to use her." Nor because he also said that "defendant is not only charged with a crime, but he is guilty of it."—State of Iowa v. Millmeier, 692.

49. **New Trial—NEWLY DISCOVERED EVIDENCE**—Newly discovered evidence is not a ground for new trial in a criminal case.—State of Iowa v. Watson, 651.

Officer—See *ante*, 7.

Public Officer—See *ante*, 7.

Rebuttal—See *ante*, 8, 26.

Refusing Vote—See *ante*, 4, 31, 39, 42.

Robbery—See *ante*, 38.

Uttering—See *ante*, 37.

CROSS-EXAMINATION—See CRIM. LAW, 21; PRACT. 29.

CROSSINGS—See RAIL. 1.

DAMAGES—See BREACH OF PROM. 3, 3; EMINENT DOM.; OFFICE AND OFFICER, 4; PRACT. 18; RAIL. 19.

1. **Evidence**—In an action to recover for injuries to a farm by fire, evidence of the income from the orchard destroyed by fire, for several years prior to the fire, is admissible.—Rowe v. C. & N. W. R'y Co., 286.

DAMAGES Continued

2. **EVIDENCE OF AMOUNT ESSENTIAL**—Though defendant was put to expense in necessary changes because the plaintiff did not complete a building contract in accordance with its terms, if the evidence fails to show the amount of such expense, there can be no recovery on a counter-claim.—*Fitts & Co. v. Reinhart*, 311.
3. **Exemplary Damages—FINE AS BAR TO**—The fact that defendant in a civil action for assault has been fined in a former prosecution is no bar to an allowance of exemplary damages.—*Hauser v. Griffith*, 215.
4. **MUNICIPAL CORPORATIONS**—Exemplary damages cannot be awarded against a municipal corporation, except under express statutory authority.—*Bennett v. City of Marion*, 425.
5. **Measure—LANDLORD AND TENANT—Instructions**—An instruction in an action by a tenant for eviction from a leased hotel before the expiration of his term, that the measure of damages is the difference between the agreed rent and the actual value of the premises, is not erroneous as not based on sufficient evidence, where it is shown that during the period in question the hotel was doing a good business which made its actual rental value greater than the agreed rent.—*Mathews v. Herrón*, 45.
6. **Same**—An instruction denying the right of a tenant who had been ousted from the leased premises before the expiration of his term, to recover the value of furniture put in by him, under the terms of the lease, to replace furniture which had worn out, is not inconsistent with another instruction that he would be entitled to recover for the use of such furniture for the period during which he was deprived thereof —*Idem*.
7. **TELEGRAM DELIVERY**—See *post*, ¹²—The loss of profits from a sale of horses resulting from the failure of a telegraph company to deliver a telegram directing the shipment of the horses to a specified place, is properly allowed to the owner, as damages naturally resulting from the breach of the contract.—*Evans et al. v. Telegraph Co.*, 219.
8. **Same**—The car having been sent to San Antonio pursuant to the previous arrangement, and not because sale at Little Rock was lost by the company's negligence, the question of plaintiff's diligence in sending the horses to San Antonio for sale is not involved.—*Idem*.
9. **SETTING FIRE TO ORCHARD**—Where plaintiff's orchard, covering nineteen acres, was burned by sparks from defendant's locomotive, the measure of damages is the difference between the fair market value of his farm, not including the grass or fences

DAMAGES Continued

TO

DIVORCE

destroyed, before the fire and immediately after the fire.—*Rowe v. C. & N. W. Ry Co.*, 286.

10. *Same*—Where property destroyed by fire is so closely connected with the real estate that it has no value independent thereof, the measure of damages is the difference in the value between the real estate before and after the fire.
Idem.
11. **Proximate**ness—A state inspector of illuminating oil is not liable for damages caused by the explosion of oil which has been tested by him and marked to flash at a temperature which is erroneously stated too high, if the explosion was not the result of the erroneous marking, but resulted from the use of an unsafe lamp.—*Hatcher v. Dunn*, 411.
12. **Telegram**—**NON-DELIVERY**—Where a telegraph company had no knowledge of an agreement that a car of horses was to be shipped to San Antonio, in the absence of instructions to the contrary, its failure to deliver a message directing the car to be shipped to Little Rock did not render it liable for the damages resulting from the car being sent to the former place.—*Evans et al v. Telegraph Co*, 219.
13. **NOTICE**—A message directing horses to be shipped to a named point was sufficient notice to the telegraph company of damage which might result from failure to deliver it.—*Idem.*

DEEDS—See **EVID.** ^{16, 17, 37}; **PRACT.** ⁶.

DEFAULT—See **ATTORNEYS**, ¹; **FRAUD**; **JUDGMENTS**, ²; **PRACT.** ^{13, 14, 24}.

DELIVERY—See page 749; **INSUR.** ¹¹; **MORTGAGES**, ²; **PRIN. AND SURETY**, ^{1, 3}; **SALES**, ^{3, 4}.

DEMURRER—See **PLEADINGS**, ⁴; **PRACT.** ^{7, 12}; **PRACT. SUP. CT.** ^{38, 39, 33}.

DEPOSITIONS—See **EVID.** ¹⁵; **PRACT.** ²¹.

DESCENT AND DISTRIBUTIONS—See **ESTATES**, ^{4, 5, 7, 8, 12}.

DESCRIPTION—See **MORTGAGES**, ^{1, 2}.

DISTRIBUTION—See **PLEADINGS**, ⁴; **WILLS**, ⁸.

DIVORCE.

1. **Cruel Treatment**—A charge of cruelty, in that defendant had an abortion produced on plaintiff, is not supported in an action for maintenance, by plaintiff's testimony as to her sickness, opinions of physicians that it might have resulted from abortion, though it might have been otherwise caused, where it appears that plaintiff's menses were regular at the time of the alleged abortion; that she frequently stated thereafter that she had not miscarried; and did not claim to have discovered the alleged abortion until after bringing the action,—four years later; and where a witness contradicted plaintiff as to occurrences on that day; and defendant and the physician alleged to

Small figures refer to subdivisions of Index. The others to page of report.

DIVORCE Continued

TO

ESTATES

have produced the abortion denied all knowledge of it.—*Briggs v. Briggs*, 818.

2. **DESERTION**—Failure of a husband to protest against the action of his wife in leaving him with a statement that she is going on a visit, will not entitle the wife to a divorce against him on the ground of desertion, although he believed she was deserting him when she made such statement.—*Idem*.

DOCTORS—See **WILLS**, 2.

ELECTIONS—See **CRIM. LAW**, 4, 5, 6, 22; **PRACT. SUP. CT.** 15.

EMBEZZLEMENT—See **CRIM. LAW**, 7, 8, 9, 10, 11.

EMINENT DOMAIN.

ACCEPTANCE OF DAMAGES—*Trial de novo*—The acceptance by a land owner of the amount of damages allowed him by the sheriff's jury in proceedings to condemn a railroad right of way, and the concealment of such fact, will not prevent him from recovering a larger award on appeal, where the railroad company procures an appeal on its own account because it is dissatisfied with the amount of the award, although Code, section 1256, provides that acceptance by the land owner of the damages awarded shall bar his right to appeal—*Burns v. Chicago, Ft. M. & D. M. R'y Co*, 7.

EQUITABLE LIENS—See **LIENS**; **MTGS.** 2.

ESTATES—See **EVID.** 22; **ATTORNEYS**, 1; **WILLS**, 1, 4.

1. **ADVANCEMENTS**—**CONSTRUCTION OF STATUTE**—The word "now" in Code, section 2459, providing that property given by an intestate by way of an advancement to an heir, shall be considered a part of the estate so far as regards the distribution thereof, and shall be taken by the heir towards his share at what it would "now" be worth, if in the condition when the gift was made,—refers to the time of distribution, and not to the date of the passage of the act.—*Finch v. Garrett*, 381.
2. **PRESUMPTIONS**—A voluntary conveyance by a parent to a child is presumed to be an advancement, and the burden of showing that it is not, is on the person claiming that it was not so intended—*Idem*.
3. **PAROL VARIANCE OF DEED**—Parol evidence is admissible to show that a deed from a parent to a child, expressing a valuable consideration, was in fact voluntary, where the purpose is to show that the conveyance was an advancement to the child, and not to avoid the deed.—*Idem*.
4. **ALIENAGE**—**DESCENT AND DISTRIBUTION**—*Mediate and Immediate Inheritance*—Under Code, section 2457, providing that if both parents of an intestate be dead, the portion of the estate which

ESTATES Continued

- would have fallen to them shall be disposed of as if they had out-lived intestate, and died in possession of their portion, where a son dies after the death of his parents, who would have otherwise inherited, the inheritance which passes to his brother is direct, and does not depend on the fact whether the parents, at the time of their decease, being aliens, were capacitated to take under the provisions of the law.—*Wilcke v. Wilcke*, 178.
5. "PURCHASE" DEFINED—*Construction of Statute*—An alien taking land in Iowa under a will takes the property by purchase, within Acts Twenty-second General Assembly, chapter 85, providing that a non-resident alien may acquire property, to a certain extent, if, within five years from the date of *purchase*, the same is placed in the actual possession of a relative of such purchaser.—*Doehrel v. Hillmer et al.*, 169.
 6. TREATY RIGHTS—*Evidence*—Under the treaty between the king of Prussia and the prince of Waldeck, and other evidence adduced, the citizens of Waldeck became subjects of the king of Prussia, so as to be affected by the terms of the treaty between the United States and Prussia governing the rights of inheritance of citizens of the respective countries.—*Wilcke v. Wilcke*, 178.
 7. CONSTRUCTION OF TREATY—Under a treaty which provides, that a citizen or subject of one country to whom land in the other country would descend, were it not for his alienage,—a non-resident alien may inherit land in Iowa, from a citizen of Iowa, and if he die before his children they will take what would have descended to the father, though the children, too, are non-resident aliens.—*Doehrel v. Hillmer et al.*, 169.
 8. *Conflict of Laws*—A treaty providing that aliens may inherit lands is controlling, though in conflict with laws of the state.—*Idem*.
 9. Executor and Administrator—APPLICATION OF PROPERTY—The heirs in a proceeding for the sale of decedent's real property to pay her debts may, for the purpose of exonerating the real estate, invoke an order of the court for a proper application of personal estate which the administrator claims in his individual right, and has failed to include in the inventory.—*Duffield v. Walden*, 676.
 10. Filing Claims—LIMITATIONS—A claim against the executors arising under U. S. Rev. Statutes, sections 5151, 5152, by reason of the testator's ownership of stock in a national bank which was closed after his death, is not within Code, section 2421, providing that all claims of the fourth class against decedent's estate shall be barred unless filed and approved within twelve

ESTATES Continued

TO

EVID

months of the giving of notice of the appointment and qualification of the executors, as that section is limited to claims existing at the time of decedent's death.—*Wickham v. Hull*, 469.

11. **LACHES—Filing Claims**—The delay of a receiver of a national bank, for over eighteen months after an assessment of the capital stock of the bank, under U. S. Rev. Statutes, sections 5151, 5152, to enforce the same against the estate of a stockholder who died before the bank had been closed, does not bar a claim against the estate, founded upon a judgment recovered therein, although no reason is given for the delay, where the estate is solvent, and no prejudice has resulted from the delay.—*Idem*.
12. **Widow's Share**—A widow is entitled to one-half the estate of her husband takes the added one-sixth in addition to the third given by Code, section 2440, as heir, and not as part of her distributive share, and takes subject to the same rules as govern property taken by other heirs, including payment of incumbances.—*Wilcke v. Wilcke*, 173.

ESTOPPEL—See EVID. ^{19, 20}; INSUR. ²¹; MUN. CORP. ²; PRACT. SUP. CT. ²²; RAIL. ²; WAIVER, ⁴.

EVIDENCE—See BREACH OF PROM. ^{4, 5}; CONTRACTS, ^{1, 4}; CRIM. LAW, ^{2, 12, 13, 14, 15, 17, 23, 25, 26, 27}; DAMAGES, ^{1, 2}; FRAUD. CONV. ^{2, 3}; GARNISH. ⁴; ILLEGITIMACY, ^{1, 2}; INSUR. ²; MUN. CORP. ¹⁰; NEGLI. ²; PLEA AND PROOF, ²; PRACT. ^{11, 22, 23}; PRINC AND SURETY, ²; RAIL. ^{2, 16}; WILLS, ².

1. **Admissibility of Certificate—Thermometer Variations**—A certificate showing the variation of the scale of a thermometer from standard instruments, is properly admissible in evidence, together with the thermometer which it was made to accompany, in cases where the instrument itself is properly admissible.—*Hatcher v. Dunn*, 411.
2. **Admissions**—See *post*, ⁴⁹—**PLEA OF GUILTY**—In a civil action for assault, evidence of a plea of guilty on a criminal prosecution is admissible as an admission, but is not conclusive.—*Hauser v. Griffith*, 215.
3. **EXPLANATION OF**—Where, in a civil action for assault, a plea of guilty in a former prosecution is proven, defendant cannot show the circumstances under which he entered his plea, though Code, section 3650, provides that, when any act or declaration is given in evidence by one party, the whole subject may be inquired into by the other.—*Idem*.

Advancements—See *post*, ⁴¹.

Agents—See *post*, ^{14, 19, 21, 45}.

Small figures refer to subdivisions of Index. The others to page of report.

EVID. Continued

4. **Competency**—See *post*, ⁵⁸—In a suit by a sub-contractor against a corporation, to recover for extra work and materials, defendant's secretary was properly allowed to testify as to the authority of its building committee to order the extras, in the absence of any objection that it was not the best evidence, or of any proof that the board of directors kept a record of its proceedings --Foley & Paul v. Hotel Ass'n, 272.
5. **On Value**—A member of a firm which has a contract for the erection of a building, and who shows a considerable knowledge of prices of labor and material, may testify as to what is a reasonable price for laying an extra wall.—*Idem*.
6. **Conclusions**—A question requiring a witness to state whether a billboard, by the blowing over of which plaintiff was injured, was, in any sense, in the way of people walking along the sidewalk, is properly excluded as calling for the opinion of the witness.—Cason v. City of Ottumwa, 99.
7. **SAME**—Evidence by a witness that his "contract was made" with specified persons, is inadmissible, as a conclusion of the witness.—Farmer v. Brokaw, 246.
8. **SAME**—Evidence by the acceptor of a draft that certain facts left with him the impression that the president of the payee bank distinctly understood his original expression that he would become responsible not to exceed two thousand five hundred dollars on account of the maker of the draft, is inadmissible, as the witness' conclusion —First National Bank v. Booth, 333.
9. **Contract**—See *post*, ⁵⁶—**DISSOLUTION OF INSURANCE AGENCY**—An agreement between persons in the business of a fire insurance agency, by which one of them sells his interest in the agency to the others, agreeing not to apply for nor accept specified companies, with the distinct understanding that he does not sell his good will in any 'of the business or renewals now on the books of the agency, but reserves the full right and privilege of soliciting, securing, and writing any of the same." entitles such member to issue policies in place of those expiring as well as those in renewal of policies.—Lantz v. Ryman, 348.
10. **INTERPRETATION OF AMBIGUOUS CONTRACT**—Mulhall Bros. recovered judgment against claimant They arranged to have him deed some land on which their judgments were liens to a stranger who assumed all liens Another judgment, also a lien on the land, was obtained against plaintiff by one Wilts Mulhall Bros. agreed by a writing to "release all personal judgments and liens of record against the land, only, as more fully shown" by an exhibit which merely set out certain

EVID. Continued

mortgages and judgments held by Mulhall Bros. against plaintiff. It also provided that all liens and judgments were to remain a lien. Plaintiff paid off the Wilts judgment and sought to recover therefor, on said contract, at law. *Held:*

- a. The contract did not cover the Wilts judgment.
 - b. The clause *releasing* plaintiff from all personal judgments and liens is, apparently, a limitation upon the clause that all judgments should remain liens.
 - c. The contract was so ambiguous as that Mulhall Bros. should have been allowed to show that the grantee had received a release of the Wilts judgment before they signed said contract, and that they knew this before signing.—*Wilts v. Mulhall Bros.*, 458.
11. **ORAL LAND SALE**—The burden is upon one asserting a parol agreement by his mother, in consideration that he would cultivate and improve her land and allow her to live with him whenever she choose, to give him the land at her death, to establish by clear and satisfactory evidence the existence of such agreement and his performance of the conditions.—*McDonald v. Basom*, 419.
 12. **Rule Applied**—An oral agreement between a son and his father and mother who were about to separate, that the son was to have the use of certain land belonging to his mother, and the title in fee on her death, in consideration of her having a home with him, is not established where it appears that the declarations of the father touching the agreement were not made in the presence of the mother; that the mother's statements, as shown by several witnesses, expressed no more than an intention to give the land to the son if he took care of her; and that, while one witness testified to a proposition made by the mother as claimed by the son, it did not appear that he assented to the proposition; and where it appears that the mother passed but a small portion of the remainder of her life with the son, and that part of the land was cultivated by a son-in-law.—*Idem*.
 13. **Cross-examination**—See *post*, 20, 21.—On trial of an indictment of a banker for receiving money when insolvent, where defendant, to show want of connection with the transaction, testified that, on the morning of the day that the deposit was made, he left the town where his bank was located, and went to W, after promising to telephone his son, left in charge of the bank, if things did not look favorable, not to receive deposits, and that he sent that message, the court was not required to confine the cross-examination to what defendant did at W. It was proper

EVID. Continued

to cross-examine as to any matter which tended, more fully, to disclose whether the want of connection asserted, existed.—*State of Iowa v. Eifert*, 188.

Decedents—See *post*, *.

14. **Declarations—AGENTS**—A statement by a telegraph agent to the sender of a telegram, on calling for an answer, that the message had not been sent is admissible against the company in an action for failure to deliver the telegram —*Evans et al. v. Telegraph Co.*, 219.
15. **OF GRANTOR**—Declarations of grantors in disparagement of their title, when made before their conveyance, are admissible against their grantee.—*Finch v. Garrett*, 381.
16. **DEEDS—PAROL VARIANCE OF—Advancements**—Parol evidence is admissible to show that the deed from a parent to a child, expressing a valuable consideration, was in fact voluntary, where the purpose is to show *that the conveyance was an advancement to the child, and not to avoid the deed*.—*Finch v. Garrett*, 381.
17. **RESERVATION FROM**—In a suit to quiet title the plaintiff was the grantee named in a deed conveying the lot "except — feet off the east side of the same " The preponderance of the evidence showed that he had agreed that he would not record the deed until this blank was filled with the width covered by a stairway, to be ascertained subsequent to the execution and delivery of the deed. *Held*, that a decree that the east four and a half feet of this lot, this being the width covered by the stairway, was not conveyed by the deed, would not be disturbed.—*Brown v. Lahart*, 746.
18. **Depositions—Privies**—Depositions taken before one of the defendants was made a party to the suit, are not admissible against him, although his interest in the subject litigated was older than the litigation.—*Brown v. Zackary*, 433.
19. **Estoppel**—Declarations of a general agent of an insurance company to a medical examiner that the company desired him to hold his bill for examination fees until the finances improved, made in connection with his statement that the only way the examiner could get the money for present use was to accept the agent's note and indorse it in blank until the collections came in, are admissible, irrespective of the scope of the agent's authority, where the company claims the acceptance of the agent's note by the examiner as a payment or an estoppel. — *Hannawalt v. Equitable Life Assurance Society*, 667.

EVID. Continued

- 20. BY CONDUCT**—Defendant cannot complain of testimony elicited upon cross-examination of its witness in response to questions put to him in consequence of questions equally objectionable, asked by the defendant; especially where it is not prejudicial.—*Tyler v. C. & N. W. Ry Co.*, 632.
- 21. FAILURE TO OBJECT**—The failure of a seller in a bill of sale to object to the transfer of the possession of the goods from one agent of the buyer to another has no tendency to disprove his claim that the sale was on a credit and that it did not constitute a part of the consideration for the cancellation of notes and mortgages held by the buyer against him, in addition to the revenues of the land subject to the mortgages.—*Ludwig v. Blackshere*, 366.
- Explanations**—See *ante*, ¹.
- 22. False Representations—WRITTEN AND ORAL**—In an action to recover goods sold, false oral representations by the purchaser (on credit) as to his financial condition may be shown by the seller, who sold in reliance thereon, though written representations were made at the same time.—*Jandt v. Potthast*, 223.
- 23. EVIDENCE OF INTENT**—Evidence that a purchaser of goods on credit persisted in concealing an indebtedness to his father after his attention was particularly called to written questions presented to him to give the amount of his liability, is admissible, although he did not write down any answers to the questions themselves.—*Idem*.
- 24. RELIANCE OF SELLER—Credit Man**—The seller may show by the testimony of his credit man that he would not have sold on credit had he known the purchaser's real financial condition.—*Idem*.
- 25. Memoranda by Agent of Seller**—Pencil memoranda made by the agent of the seller of goods on a statement by the purchaser as to his financial ability, to the effect that the latter bought the goods at a specified time and owes nothing on them, are admissible in evidence to show on what statements and representations, if any, the seller relied in making the sale.—*Idem*.

Fraudulent Banking—See *ante*, ¹².

- 26. Harmless Error**—Error in allowing plaintiff in re-direct examination to state, as a conclusion, with whom the contract in suit was made, is harmless, where he immediately added that he had no contract other than the one he had detailed in his direct and cross-examination.—*Farmer v. Brokaw*, 246.

EVID. Continued

27. **SAME**—The exclusion of the entries in the inspection book in which the condition of railroad locomotives on the days of inspection are noted is not prejudicial in an action involving the condition of an engine, where the witness who made them testified positively to the facts in regard to the condition of the engine, which the entries show.—*Tyler v. C. & N. W. R'y Co.*, 632.
28. **CURED BY INSTRUCTIONS**—In a proceeding to condemn a right of way, certain witnesses considered the fact that the proposed right of way would destroy a connection between two tracts of land by crossings under bridges in the highway. The court charged that the land owner had no right, without the consent of the supervisors, to so connect the two tracts, "and you should not consider that he had any such right, in arriving at your verdict in this case," and that "any evidence upon that subject is withdrawn from your consideration." *Held*, that the evidence was without prejudice to the defendant.—*Burns v. Chicago, Ft. M & D. M. R'y Co.*, 7.
- Husband and Wife**—See *post*, 4.
29. **Impeachment**—A witness cannot be impeached by cross-examination eliciting that he has been in jail a number of times in the county, and that he has had trouble with the officers.—*State of Iowa v. Millmeier*, 692.
30. **FOUNDATION**—A witness cannot be impeached by evidence of contradictory statements made out of court unless his attention is called to such statements, on his examination.—*State of Iowa v. Watson*, 651.
- Intent**—See *ante*, 23.
- Land Sale**—See *ante*, 11.
31. **Objections**—See *ante*, 4; *post*, 4.—An objection to the introduction of evidence as incompetent and immaterial, does not raise the objection that it is not the best evidence.—*Foley & Paul v. Hotel Ass'n*, 272.
32. **WAIVER**—Where, on cross-examination, defendant is required, over objection, to testify to certain facts, he waives any error committed in overruling the objection by afterward testifying to the same facts, without objection.—*State of Iowa v. Eifert*, 188.
33. **Opinions**—See *ante*, 6.—**FOOTPRINTS**—One witness testified that he had noticed certain peculiarities in defendant's footprints, that certain tracks leading from the railroad to the burned building, and in the direction of defendant's property, had the same peculiarities. Another testified that there was a similarity between the tracks described by the former witness and

EVID. Continued

those made by defendant, and that he thought they were the same. *Held*, that such evidence was not objectionable because it consisted of the witnesses' opinion.—*State of Iowa v. Miller*, 692.

34. **MENTAL CAPACITY**—A non-expert witness cannot give her opinion as to the mental capacity of testatrix unless such opinion is based solely on facts relating to the conduct and action of the testatrix as detailed in the evidence of the witness.—*Furlong v. Carraher*, 358.

35. **MENTAL PAIN**—A witness need not be an expert on the human mind and mental diseases to render him competent to testify to manifestations of mental pain and anguish by another.—*McDonald v. Franchere Bros.*, 496.

Oral Evidence—See *post*, 47.

36. **Parol Variance**—See *ante*, 16, 22.—**AMBIGUITIES**—Plain and unambiguous language in a written contract cannot be varied by evidence of declarations of one of the parties, made after the execution of the contract.—*Lantz v. Ryman*, 348.

37. **SAME**—It appeared that the firm kept an expiration register, and that the terms "renewals" and "expirations" were used by insurance men, interchangeably. *Held*, that parol evidence of contemporaneous conversations between the parties or subsequent statements by plaintiff, were not admissible to prove that he sold to defendants his interest in the expirations.—*Idem*, 348.

38. **INDORSEMENT IN BLANK**—Where a note provides that indorsers waive presentment, protest, and notice of non-payment, one transferring it by blank indorsement cannot show by parol that his indorsement was simply to transfer title, even, as against a holder who knew of such verbal agreement.—*Farmer Savings Bank v. Wilka*, 315.

39. **Personal Transaction with Decedent**—Where plaintiff is a surviving husband, and administrator of his wife's estate, and defendants are the wife's heirs, claiming that a certificate of deposit in the wife's name at the time of her death, belonged to her estate, the husband is not a competent witness to show that he became the owner of said certificate through personal transactions with his wife, in view of Code, section 3639.—*Duffield v. Walden*, 676.

Plea of Guilty—See *ante*, 2.

40. **Pleadings**—**SUPERSEDED**—An original answer which has been superseded by an amended answer may be admissible in evidence as an admission of the facts alleged therein, subject to

EVID. Continued

- the right of the defendant to show that such facts were mistakenly or inadvertently pleaded.—*Ludwig v. Blackshere*, 366.
41. **PRESUMPTIONS—ADVANCEMENTS**—A voluntary conveyance by a parent to a child is presumed to be an advancement, and the burden of showing that it is not, is on the person claiming that it was not so intended.—*Finch v. Garrett*, 881.
42. **KNOWLEDGE OF LAW**—Though it is presumed that the inhabitants of a city know what its ordinances provide, the fact that one has knowledge of a particular ordinance, may be shown by his evidence.—*Moore v. Railway*, 601.
43. **PAYMENT—Failure to Sue and Attach**—An instruction, in an action on a claim due for many years, that, though defendant was a non-resident, his land at plaintiff's residence could have been subjected to payment, and therefore a presumption of payment arose from delay in suing, is properly refused, since such land could only have been reached by attachment suit, in which a bond is required.—*Ludwig v. Blackshere*, 366.
- Principal and Agent**—See *ante*, ¹⁴, ¹⁹, ²¹, ⁴⁶.
44. **Privileged Communications**—The rule that statements made in the hearing of others by a husband or wife as to conversations between them are admissible, does not apply to testimony of a spouse given on a former trial, though in the presence and without the objection of the other.—*Kelley, Maus & Co. v. Andrews*, 119.
45. **AGENCY OF HUSBAND**—The fact that a husband was agent for his wife in respect to the transactions sought to be inquired about does not make him competent to testify against her as to his relation to her as such agent; Code, section 3642, providing that neither spouse can be examined as to any communication between them.—*Idem*.
- Recitals**—See *post*, ⁴⁰.
- Relevancy**—See ⁵⁰ *post*.
46. **ADMISSIONS**—A letter, written by the assignor to the assignee shortly before the transaction, in which he said, "I took this paper myself and know it to be good, and a good man behind it," would not be presumed to refer to the notes in suit, in the absence of evidence.—*Brown v. Zackary*, 433.
47. **PAROL**—Parol evidence of the action taken by an insurance company in regard to a loss under a policy issued by it, and of its decision to rebuild, is admissible where no record of such action was made; and is relevant in an action upon the policy.—*Zalesky v. Iowa State Ins. Co.*, 512.
48. **RECITALS IN BILL OF SALE—Presumption**—An instruction that the giving of a bill of sale was presumptive evidence that the

EVID. Continued

personalty sued for was paid for at the time of purchase, and that the value thereof was the consideration stated, is properly refused where not all the personalty sued for was included in the bill of sale.—*Ludwig v. Blackshere*, 366.

49. **SETTING FIRE**—The evidence of a witness as to fires other than that in question, but seen near the railway soon after the engine which is claimed to have set the fire in question had passed, and that he went to them at once, but did not see any person or thing which could have caused the fire, except the engine, is admissible.—*Tyler v. C. & N. W. R'y Co.*, 632.
 50. **VALUE**—Evidence as to the quality and value of defendant's farm is inadmissible in an action for commissions in finding a purchaser for the land, at a specified price per acre fixed by defendant.—*Goin v. Hess*, 140.
 51. **SAME**—Evidence that the owner of land kept it on the market, for sale, from the time he purchased it, and as to the price for which he sold it, is inadmissible to show its value at the time of its purchase by him, in the absence of evidence to show what effort he made to sell the land or to find a purchaser.—*Ludwig v. Blackshere*, 366.
 52. **SAME**—Evidence of the value of land conveyed to a mortgagee in satisfaction of the notes and mortgages, is admissible on the question whether a bill of sale from the mortgagor to the mortgagee was upon an independent consideration or was part of the consideration for the cancellation of the notes and mortgages.—*Idem*.
- Setting Fire**—See *ante*, 49.
53. **Settlement and Compromise**—Where an agreement recites that it was an agreement of settlement and compromise of a disputed claim, it is inadmissible in an action on such claim.—*Houdeck v. Bankers Insurance Co.*, 303.
 54. **Statute of Frauds—Order of Liens**—An agreement by a vendor, that his vendor's lien shall be subordinate to a mechanic's lien for material to be furnished to the purchaser for improving the property, is not a contract for the transfer of an interest in real estate, within the inhibition of the statute of frauds against verbal contracts for such purposes; nor is it within the statute as an agreement to answer for the debt of another.—*Townsend v. White*, 477.
 55. **ORAL LEASE**—An oral agreement to lease is not taken out of the statute of frauds by testimony of the alleged lessor, that, while a lease was negotiated, its terms were not fully settled. Omissions from the alleged lease cannot be supplied by evidence

- EVID. Continued TO FALSE REP.
- other than defendants; neither is defendant estopped to deny the lease —*Powell v. Crampton*, 364.
56. *Part Performance*—Part performance of an oral contract to lease land, for the term of more than one year, does not take the case out of the statute of frauds, and evidence for that purpose is not admissible.—*Idem*.
57. *Undue Influence*—A finding that a deed to two of the grantor's sons was not void for mental incapacity or undue influence, is sustained by evidence that he made a substantially similar disposition of his property by a will previously executed when his mental competency was unquestioned, and that he repeatedly stated that he intended to give the land to them, and that they had lived with him for many years.—*Claffin et al. v. Claffin et al.*, 744.
58. *Value*—See *ante*, ⁵⁰, ⁵¹, ⁵², ⁵³—In an action against a railroad for damages for negligently destroying grass land by fire, statements of witnesses that the grass land in question was the best in the county, and tending to show the value of the grass in question, were admissible, though some of them were based on knowledge of similar pastures instead of actual knowledge of the grass destroyed and, though this testimony was, in some respects, objectionable, it was not prejudicial.—*Tyler v. C & N. W. R'y Co.*, 632.
59. *SAME*—Evidence of the value of the land at the time of the trial is inadmissible, in the absence of evidence that the value had not changed since the time of the transactions in regard thereto, for which suit is brought.—*Goin v. Hess*, 140.
60. *Witnesses*—See *ante*, ⁴, ³⁰, ⁵⁸—*TRAMPS*—That a witness is a tramp is not ground for excluding his evidence.—*Parker v. Parker*, 500.
- EXCEPTIONS—See PRACT. SUP. CT. ¹¹, ¹², ¹³.
- EXECUTORS—See ESTATES, ⁹.
- EXEMPLARY DAMAGES—See DAMAGES, ⁴.
- EXTRAS—See CONTRACTS, ², ³.

FALSE REPRESENTATIONS—See EVID. ²², ²³, ²⁴, ²⁵; FRAUD; NEGOT. INSTR. ¹.

1. A representation by a retiring member of a firm of insurance agents that he has no copy of the expiration list of policies, even though false, is immaterial where the dissolution agreement reserved to him his good will in the business and the right to solicit and secure renewals of policies.—*Lantz v. Ryman*, 348.

Small figures refer to subdivisions of Index. The others to page of report.

FALSE REP. Continued

TO

FRAUD. CONVEY.

2. **COUNTIES**—*Fraud of Officer in Selling Swamp Lands*—One who takes a quitclaim deed from officers authorized to sell swamp lands in behalf of the county, relying on their false and fraudulent representations that the land inured to the county under the swamp land acts, and misled by their concealment of the fact that the county had been adjudged not the owner, of which adjudication the county had made no record, may recover the consideration paid to it.—*Nelson v. Hamilton County*, 229.

FELLOW SERVANTS—MASTER AND SERVANT, ¹.**FORFEITURE**—See CONTRACTS, ¹¹, ¹²; INSUR. ⁷, ⁸, ¹², ¹³; LAND. AND TENANT.

LAND SALES—A purchaser of land, who has paid part of the price, and fails to carry out his contract, through no fault of the seller, cannot recover the money paid, though the contract does not provide for a forfeiture.—*Downey v. Riggs*, 88.

FORGERY—See CRIM. LAW, ²⁸.

FORMER ADJUDICATION—See FRAUD. CONVEY. ⁴, ⁷; JUDGMENTS, ³, ⁴, ⁵, ⁶, ⁷; MORTGAGES, ⁵, ⁶; PRACT. SUP. CT. ²²; RES ADJUDICATA.

FRAUD—See page 787; FALSE REPRESENTATIONS, ¹; NEG. INSTR. ¹.**FRAUD AND COLLUSION.**

DEFAULT JUDGMENT—The fact that a judgment by default was rendered against a school district at a time when its outstanding obligations were largely in excess of the constitutional limit, does not show that it was obtained by fraud and collusion.—*Thompson v. District of Allison*, 94.

FRAUDULENT CONVEYANCE—See GARNISHMENT, ¹, ⁴.

1. **Evidence**—Where a judgment defendant transferred or mortgaged his property to his wife in consideration of a deed to his homestead, which was exempt, and retained possession of personal property mortgaged; and disposed of it without accounting, and managed his wife's business as he pleased, keeping no separate account, a finding is authorized that the mortgages and conveyances were made with intent to defraud creditors.—*Thomas v. McDonald*, 564.
2. **STATEMENTS BY VENDOR**—Statements made by a vendor of land prior to the sale and relating thereto, are admissible to establish his motive in making the sale, where it is attacked as fraudulent.—*Idem*.
3. **SAME**—A conversation by a vendor of land eight years after the sale with one of his creditors, in which he tells him that he had intended to pay him but had things fixed so that he would not,

Small figures refer to subdivisions of Index. The others to page of report.

FRAUD. CONVEY. Continued

TO

GARNISHMENT

is inadmissible on the question of fraud in making the sale.—*Idem.*

4. **SAME**—Agency of a husband for his wife in executing a mortgage to her to secure a loan is not shown, so as to charge her with his fraudulent intent in so doing, merely by her testimony that she always expected him to secure her, and intended to be secured.—*Kelley, Maus & Co. v. Andrews*, 119.
5. **Judgment**—A judgment in favor of a wife against her husband obtained by collusion between them for the purpose of hindering, delaying and defrauding the husband's creditors, is void as to such creditors.—*Thomas v. McDonald*, 564.
6. **FORMER ADJUDICATION**—Judgment on foreclosure by a wife, of a mortgage on the homestead, executed by her husband, was not an adjudication against a judgment creditor of the husband as to the validity of the indebtedness, though he filed and afterwards withdrew an answer, as his judgment gave him no lien upon the premises —*Idem.*
7. **Same**—A judgment dismissing an action attacking deeds to certain land executed by a husband to his wife is not conclusive as against a creditor of the husband as to the validity of a mortgage on other land executed by the husband to the wife at about the same time.—*Idem.*

FIRES—See **DAMAGES**, ¹, ⁹, ¹⁰; **EVID.** ⁴²; **RAIL.** ¹⁴ to ¹⁸.

GARNISHMENT—See **PRACT.** ⁹.

1. Under Code, sections 2975 and 2988, providing that if the garnishee has any of defendant's property in his hands at the time of being served, or at any time subsequent thereto, he shall be liable, the garnishee is liable for property of the judgment debtor given into her hands after notice served, and before trial and judgment on the answer.—*Thomas v. McDonald*, 564.
2. **SAME**—The debt due, or to become due, covered by the garnishment statute is one in existence when notice of garnishment is served, and not one incurred thereafter.—*Idem.*
3. **Defective Notice**—**WAIVER**—A garnishee waives the defect in a notice requiring him to appear on a specified day before the first day of the next term of court instead of on such first day, as required by Code, section 2979, by voluntarily appearing and answering, although on the condition that the priority between such claim and others subsequently served shall be settled at a future time, and that no rights or claims are waived by taking the answer.—*Gilmore & Ruhl v. Cohn*, 254.
4. **Fraudulent Conveyance**—Evidence that plaintiff in garnishment proceedings had the homestead of the principal defendant sold under execution issued on his judgment, but that no

GEN. ASSIGN.

TO

GUARDIAN

sheriff's deed was taken thereunder, is inadmissible in favor of the garnishee.—*Thomas v. McDonald*, 564.

GENERAL ASSIGNMENTS.

1. **Preferences**—A banking partnership, being insolvent, executed a number of deeds and mortgages to secure certain creditors, and a trust deed to plaintiff to secure depositors who were named therein as beneficiaries, plaintiff being a depositor for a nominal amount. A corporation of which the partners were controlling members, and to which the firm was largely indebted, also executed a general assignment. The trust deed, at the time of its execution, included practically all the property owned by the firm. *Held*, that the conveyances must be regarded as one transaction, constituting a general assignment, and therefore void, under Code, section 2115, declaring that no general assignment shall be valid unless made for the benefit of all the creditors.—*Elwell v. Kimball & Champ*, 720.
2. **EVIDENCE**—The finding of the court that it was the intention of the parties to a deed of trust of substantially all the grantor's remaining property to make a general assignment, with preferences, is justified by evidence that the grantors were hopelessly insolvent, and were being pressed by creditors not secured by the deed. That the claims secured were based on misappropriations of trust funds by the grantors, except the personal claim of the trustee, which was evidently created in contemplation of the execution of the deed, and that the grantors made a number of other transfers the same day, or the day before.—*Idem*.
3. **Trust Obligations**—The claims of the depositors named in the trust deed cannot be regarded as trust obligations, so as to entitle them to priority over the claims of general creditors.—*Idem*.
4. **RULE APPLIED**—A deed of trust is not taken out of Code, section 2115, providing that no general assignment by an insolvent for the benefit of creditors shall be valid unless made for the benefit of all creditors in proportion to the amount of their respective claims, because the claims preferred are based on misappropriations by the grantors of funds held in trust by a corporation of which they were officers, and devoted by them to the payment of deposits in a bank conducted by them, made after they knew they were hopelessly insolvent.—*Idem*.

GUARDIAN.

1. **Appointment of—Discretion of Court**—As between an unmarried woman whose employment as school teacher was not

Small figures refer to subdivisions of Index. The others to page of report.

GUARDIAN Continued

TO

ILLEGITIMACY

permanent, and her married sister, who already had the custody of their eight years old nephew, and was able and willing to care for him as one of her own children, the court properly selected the latter as guardian.—*In re Guardianship of O'Connell*, 855.

2. SAME—Where testatrix's eight years old son had a good home with his married aunt, who was able and willing to care for him, her appointment as guardian in preference to persons who were not relatives was not a clear abuse of discretion, though testatrix requested the appointment of the latter in her will, and orally expressed such desire shortly before her death, and though the fitness of such persons is not questioned.—*Idem*.

HARMLESS ERROR—See CRIM. LAW, ²³, ²⁵; ERROR WITHOUT; EVID ²⁷, ²⁸; PRACT. ¹⁰; PRACT. SUP. CT. ¹³.

HIGHWAYS—See MUN. CORP. ¹, ², ³, ⁴, ⁵.

HIGHWAY ESTABLISHMENT.

NOTICE.—Under Code, section 936, requiring notice of hearing on a petition to establish a highway to be given to all owners of land on the proposed highway and abutting thereon, "as shown by the *transfer books*," where the *transfer books* show title in a decedent, notice need not be given to his heirs, though his death and the names of the heirs are shown by the county records.—*Starry v. Treat*, 449.

HUSBAND AND WIFE—See EVID. ⁴⁴, ⁴⁵; FRAUD. CONV. ¹, ⁴, ⁵, ⁶; PRACT. ²².

ILLEGITIMACY.

1. Evidence.—A finding that a specified person is illegitimate is sustained by evidence that his mother's husband was absent from the state for nearly two years until about three months before his birth, during which absence the mother was living in open adulterous relations with another person and had a bad reputation for chastity.—*Bruce v. Patterson*, 184.
2. SAME—If a delay of eight years in asserting claim to the land of a decedent, knowing that others are dealing with the land as their own, and that his heirship is questioned, is not sufficient to establish that the claimant is illegitimate, it is, at least, entitled to weight in determining whether he is legitimate.—*Idem*.

IMPEACHMENT—See CRIM. LAW, ²⁵; EVID. ²⁹, ³⁰.

INCUMBRANCES—See INSUR. ¹⁰, ¹¹.

INDICTMENT—See CRIM. LAW, ³², ³³, ³⁴, ³⁵, ³⁶, ³⁷.

INDORSEMENT—See EVID. ²⁵.

INSTRUCTIONS TO INS.
 INDORSEMENT WITHOUT RECOURSE—See NEG. INSTRUMENTS, ¹.

INJUNCTIONS—INTOX. LIQUORS.

INNOCENT PURCHASER—See MORTGAGES, ², ⁴; SALES, ¹.

INSTRUCTIONS—See CRIM. LAW, ²², ²³; EVID. ²²; PRACT. SUP. CT. ¹¹, ¹², ¹³.

NUMBERING—The court should number the paragraphs of the charge. Whether failure so to do is ground for new trial, is not decided.—*Goin v. Hess*, 140.

INSURANCE—See CONTRACTS, ²; CONSPIRACY, ², ³, ⁴; FALSE REPRESENTATIONS, ¹; JUDGMENTS, ⁴; MORTGAGES, ², ⁷; PRACT. SUP. CT. ²²; WAIVER, ¹, ², ³, ⁴.

1. Appraisement—The demand for an appraisement, and a request of the insured by the insurer to designate an appraiser and fix a date for the appraisement, which is refused, is a compliance by the insurer with an agreement that, in case of disagreement, each party shall select an appraiser, and the two chosen shall select a third, and that the appraisers shall then estimate the loss.—*Zalesky v. Home Insurance Co.*, 613.
2. By-Law and Policy—A condition in a policy which provides for a forfeiture if insured place an incumbrance without the written consent of the insurer, is enforceable, notwithstanding that the insurer had a by-law when the policy issued which by-law made the policy void if an incumbrance, without consent, reduced the interest of the assured *to less than the amount of the insurance*.—*Houdeck v. Bankers Insurance Co.*, 303.
3. AUTHORITY TO MAKE—Under McClain's Code, section 1692, which gives to directors of an insurance company the right to establish by-laws not inconsistent with its charter, directors of an insurance company may adopt by-laws, though no authority to make by-laws is given them in the articles of incorporation.—*Idem*.
4. REPEAL—A mere disregard of a by-law of an insurance company by its officers is not sufficient to show its repeal.—*Idem*.
5. EVIDENCE—Letters written by agents of an insurance company are admissible in evidence in an action on the policy, where they show the history of the negotiations between the parties, or contain admissions made in the line of their duty, by which their principal is bound.—*Ruthven Bros. v. Insurance Co.*, 550.
6. PAROL—*Record*—Parol evidence of the action taken by an insurance company in regard to a loss under a policy issued by it, and of its decision to rebuild, is admissible where no record of

INS. Continued

- such action was made; and is relevant in an action upon the policy.—*Zalesky v. Iowa State Insurance Co.*, 512.
7. **FORFEITURE—FORECLOSURE OF AND SALE UNDER MECHANIC'S LIEN—*Change of Interest***—When a policy was issued, mechanics liens had been filed. Before the loss, the liens were reduced to judgment, and an execution issued, and the property was sold, and a certificate issued to the judgment creditor. The period of redemption had not expired at the time of the fire. *Held*, not to constitute a change of interest of the assured, within a condition of the policy providing for forfeiture in event that the title or possession of assured is changed by * * * legal process, or judgment.—*Greenlee v. Mercantile Insurance Co.*, 427.
 8. **INCREASE OF HAZARD—*Burden of Proof***—Where, at the time a policy was issued, mechanics' liens had been filed against the building, judgment and execution sale under such liens, in the absence of evidence, do not show any increase of hazard, within the conditions of the policy. The burden of showing such increase is on the insurer, and mere change in the risk is not sufficient proof.—*Idem*.
 9. **SAME**—The removal of an engine from the building, during the continuance of the policy, did not increase the risk.—*Clifton Coal Co. v. Insurance Co.*, 809.
 10. **INCUMBRANCES—*Construction of Policy***—The existence of a mechanic's lien on the "west 77 feet of the east 90 feet" of a specified lot does not show the breach of a condition against incumbrances in an insurance policy upon a specified building "situate on" such lot.—*Greenlee v. Iowa State Insurance Co.*, 260.
 11. **INCUMBRANCE CLAUSE**—A mortgage drawn, but never delivered to or for the mortgagee, is not an incumbrance, within a provision avoiding a fire policy in case the property is incumbered by a mortgage.—*Clifton Coal Co. v. Insurance Co.*, 800.
 12. **SALE OF PROPERTY—*Subsequent Consent of Insurer***—A transfer of the property insured, subject to the consent of the insurer, does not avoid the policy, where such consent is given on the same day by indorsement on the policy, which is then assigned to the transferee.—*Idem*.
 13. **VACANCY CLAUSE**—At the time a policy on an elevator building, with tools and machinery, was issued, the elevator was not in use for hoisting purposes (the insurer being informed that it would not be so used again), but was then, and at the time of the fire, used as a storehouse for the tools and

Ins. Continued

- machinery, preparatory to their removal to a new plant. *Held*, that the elevator was not vacant or unoccupied, within a clause of forfeiture in case it should so become and remain for ten days.—*Idem*.
14. **WAIVER BY ACCEPTANCE OF PREMIUM**—That an insurance company accepted an assessment paid by a policy holder on a guaranty note executed for his premium was not a waiver of a breach of a condition of the policy, unless the company had knowledge thereof at the time it accepted it; neither was it a waiver to retain such assessment, and under the evidence, waiver was a jury question.—*Houdeck v. Bankers Insurance Co.*, 308.
 15. **Limitations of Action by Contract**—A provision in a policy that no suit thereon shall be sustainable unless commenced within twelve months after the fire, is valid.—*Harrison v. Fire Insurance Co.*, 112.
 16. **CONTINUATION OF FIRST SUIT**—Code, section 2537, providing that if plaintiff fail in an action for any cause except negligence in prosecution, and a new suit be brought within six months thereafter, "the second suit shall, for the purposes herein contemplated, be a continuation of the first," does not apply to a stipulation in a policy requiring suit thereon to be brought within a specified time after loss; and the second suit will be barred unless commenced within the time so limited.—*Idem*.
 17. **Notice of Accident**—A letter by a member of an association insuring against accidents, stating that he had badly sprained his right foot, from favoring his left foot which had been previously injured, does not constitute sufficient notice of an accident to the right foot caused by stepping from a street car. Such notice must state the cause as well as the nature of the injury.—*Simons v. Traveling Men's Association*, 267.
 18. **Practice—CONDITION PRECEDENT TO SUIT ON POLICY—Appraisement**—In the absence of a statute to the contrary, clauses in an insurance policy providing for an appraisement before suit is brought must be complied with by the assured before he can commence suit on the policy; and suit before so complying is premature.—*Zalesky v. Home Insurance Co.*, 618.
 19. **SUPPLEMENTAL PETITION**—Code, section 2731, providing that plaintiff may make a supplemental petition alleging facts which have happened or come to his knowledge since the filing of his petition, does not authorize the plaintiff to plead and prove a demand for an appraisal, required by the policy of insurance sued upon, to be made before suit, after the action was commenced.—*Idem*.

Ims. Continued

To

JUDex.

- 20. Principal and Agent—WAIVER OF POLICY CONDITIONS**—In an action on an insurance policy requiring immediate notice of loss, and proof within sixty days, and providing that no condition thereof should be waived unless in writing, it appeared that the local agent of the defendant immediately notified the general manager, who had power over agents, and to pass finally on all proofs of loss; that the general manager directed a special agent, appointed by himself, to adjust the loss; that the special agent, with the approval of his superior, placed the matter in the hands of the adjuster of another company interested in the same loss, who, after examination, informed plaintiffs that the loss was total and that it exceeded the insurance, and that it was not necessary for them to do anything further in the matter; and that plaintiff, relying on such statements, did not make proof of loss until after the sixty days. *Held*, that the jury was authorized to find that the formal proofs required by the policy, and the notice and affidavit required by Acts Eighteenth General Assembly, chapter 211, section 3, were waived by the general manager of defendant, and that he also waived the written indorsement required by the terms of the policy.—*Ruthven Bros. v. Insurance Co.*, 550.
- 21. Rebuilding—ESTOPPEL OF ASSURED**—An insurance company which issues a policy authorizing it to rebuild in case of loss of a building cannot be required to pay the amount of the policy, where it had notified the insured of its intention to rebuild, and the latter made no objections, although the articles of incorporation contain a provision giving the insured a right of election to take his claim in money.—*Zalesky v. Iowa State Insurance Co.*, 512.

INTOXICATING LIQUORS—See MULCT LAW.

SECOND INJUNCTION—Abatement—An injunction enjoining a liquor nuisance and proceedings pending thereunder for contempt, though no writ of abatement issues, though the attorneys in the main suit and the contempt proceedings are not the same, and though there is unexplained delay in bringing the contempt case to hearing, are a bar to an action against the defendant by another citizen to obtain a second injunction for a similar offense on the same premises; no fraud or collusion being charged in the obtaining of the first injunction.—*Steyer v. McCauley*, 105.

JOINDER OF CAUSES—See PRACTICE, ²²; PRACT. SUP. CT. ³.

JUDGMENTS—See ATTYS. ¹; FRAUD; FRAUD. CONV. ⁵, ⁶, ⁷; PRACT. ¹¹, ¹⁴, ¹⁵, ²⁴; REPLEVIN, ¹, ², ³.

Small figures refer to subdivisions of Index The others to page of report.

JUDG. Continued

1. **ABATEMENT BY**—A judgment which is confessedly void will not abate another suit on the same subject-matter.—*Zalesky v. Iowa State Insurance Co.*, 512.
2. **Default**—A judgment by default, under the statutes, for failure of the defendant to appear and answer at the return term of the original notice, must be confined to the specific relief prayed for in the original petition, in the absence of a general prayer for relief, and its scope cannot be enlarged by the filing of an amendment to the original notice and petition, which is not served upon the defendant.—*Heins v. Wicke*, 396.
3. **Adjudication—ABATEMENT**—Code, section 2851, provides that a finding must distinguish between matters pleaded in abatement and in bar, and that the judgment, if rendered on the matter in abatement, and not on the merits, must so declare. *Held*, that a judgment entry reciting that the court found the suit was prematurely brought, and directed a verdict for defendant, sufficiently shows that a judgment was rendered on a plea in abatement, and hence is no bar to another action for the same cause.—*Harrison v. Fire Insurance Co.*, 112.
4. **FORECLOSURE**—A decree of foreclosure is not a bar to an action by the mortgagee to be subrogated to the rights of the assignee of an insurance policy on the property, after the loss, under a judgment against the insurance company, where it does not appear that the right to the insurance was litigated in the foreclosure suit.—*Heins v. Wicke*, 396.
5. **PARTIES—Partition**—A decree in partition is not binding on parties interested in the land, who were not made parties thereto.—*Furenes v. Severtson*, 322.
6. **REPLEVIN—Landlord and Tenant**—Judgment in replevin for plaintiff for the recovery of certain hotel furniture, claimed by him as head of a family, is not a bar to an action for the value of the use of similar furniture in the hotel, as to which defendant had wrongfully deprived plaintiff of the use.—*Mathews v. Herron*, 45.
7. **SEARCH WARRANT PROCEEDINGS**—An adjudication by a justice of the peace in a proceeding instituted by a search warrant for the delivery of stolen property, is conclusive as to the ownership of the property against the person upon whom the warrant was served and who appeared and asserted her rights before the justice and submitted the ownership of the property to his determination, although there was no prosecution for larceny and conviction thereof, essential to put in operation Code, section 4657, authorizing a court by which a conviction is had, to order the restoration of the

JURORS

TO

LAND. AND TEN.

stolen property on proof of ownership.—*Haworth v. Newell*, 541.

JURISDICTION—See JUSTICE OF PEACE, 2.

JURORS—See CRIM. LAW, 44; PRACT. SUP. CT. 16.

Municipal Corporations—A tax payer of a city has such an interest in the result of an action brought against the city for personal injuries as disqualifies him to act as a juror.—*Cason v. City of Ottumwa*, 99.

JURY QUESTION—See BROKERS, 2; CRIM. LAW, 43, 44, 46; NEGLIGENCE, 2; PRACT. 17, 18; RAIL. 17, 18.

JURY TRIAL—See PRACT. 19.

JUSTICES OF THE PEACE.

1. **Appeal From**—SIZE OF DISTRICT COURT JUDGMENT—*Costs*—In determining whether a judgment for plaintiff on his appeal to the district court is more favorable to him than his judgment in the justice's court, so as to exempt him from payment of costs of appeal (Code, section 8592), interest on the judgment in the justice's court, at the rate fixed therein, from its date to the date of the second judgment, must be included to ascertain the size of the justice's judgment.—*Ritchey v. Adelfinger*, 144.
2. **Jurisdiction Of**—Under the Code limiting the jurisdiction of a justice of the peace to cases where the amount involved does not exceed one hundred dollars, the justice may proceed, though a larger sum is involved, if less than three hundred dollars, where the parties submit themselves to the jurisdiction without objection; and consent to jurisdiction will be presumed where no objection appears.—*Haworth v. Newell*, 541.

LACHES—See CO-TENANCY, 4; ESTATES, 10, 11.

LANDLORD AND TENANT—See DAMAGES, 4, 6; JUDGMENTS, 6; PLEADINGS, 1.

FORFEITURE OF LEASE—An indebtedness from a landlord to his tenant, on account of the former's occupancy of a part of the premises, in an amount in excess of an installment of rent, prevents the non-payment of such installment from working a forfeiture, under a provision of the lease giving the landlord the option to declare a forfeiture for failure to pay the monthly installments of rent when due.—*Parsons v. Wright*, 478.

LAND SALES—See SALES, 6, 7, 8.

LAW AND EQUITY—See PRACT. 27; TRANSFER.

LEASES—See EVID. 45, 46.

Small figures refer to subdivisions of Index. The others to page of report.

LIENS

TO

MALICIOUS PROSECUTION

LIENS.

EQUITABLE LIEN—*Improvement of Wife's Property*—Where a husband agrees with his wife to erect improvements on her land, and to pay for the same, one selling lumber to the husband on his credit, and without intent to charge the wife thereby, cannot enforce an equitable lien against the land.—*Poe v. Ekert*, 361.

LIMITATION OF ACTIONS—See **ESTATES**, ¹⁰; **INSURANCE**, ¹⁵.

CONTINUATION OF FIRST SUIT—*Construction of Statute*—Code, section 2537, providing that if plaintiff fail in an action for any cause except negligence in prosecution, and a new suit be brought within six months thereafter, "the second suit shall, for the purposes herein contemplated, be a continuation of the first," does not apply to a stipulation in a policy requiring suit thereon to be brought within a specified time after loss; and the second suit will be barred unless commenced within the time so limited.—*Harrison v. Fire Insurance Co*, 112.

LIQUOR LAWS—See **CONTRACTS**, ¹⁶; **INTOX. LIQUOR**.

LOAN AGENT—See **CRIM. LAW**, ¹¹; **PRIN. AND AGENT**

MALICIOUS PROSECUTION.

1. **Evidence**—Plaintiff in an action for malicious prosecution based upon his arrest for an alleged wilful trespass in cutting down and removing timber injured by a cyclone on land rented from defendant, may testify that his object was to make the land available for pasture, for the purpose of negativing a wilful removal of the timber.—*Parker v. Parker*, 500.
2. **MALICE**—In an action against W and another for malicious prosecution, it appeared that W owned a farm leased to plaintiff; that plaintiff cut some dead timber on the land used as a pasture, and hauled two loads near the house; that defendants unsuccessfully prosecuted him for wilful trespass; and that, prior to the alleged trespass, W and an attorney tried to induce plaintiff to surrender the lease he then had, and take a new one with different conditions. *Held*, that it was proper to admit evidence that the attorney then told plaintiff in W's presence, that, if he complied, he would avoid litigation which would cost plaintiff so much that he would leave the farm without a dollar, and that litigation followed; and it was also proper to admit evidence that the other defendant sued plaintiff and had threatened to harass and annoy him with litigation.—*Idem*.
3. **Same**—Evidence that defendant in an action for malicious prosecution, prior to the acts on which action is based,

Small figures refer to subdivisions of Index. The others to page of report.

MALICIOUS PROSECUTION Continued TO MASTER AND SERV.

advised an employe of the plaintiff, who was a stranger to him, to leave such employment, and offered to obtain him another job, is admissible on the question of motive in causing the arrest, where the parties are brothers.—*Idem*.

4. *Same*—The slight value of timber cut and removed from land is relevant upon the question of motive in an action for malicious prosecution based upon an arrest for an alleged wilful trespass in the cutting and removal of such timber.—*Idem*.
5. **Advice of Counsel**—Defendant, to avail himself of the advice of an attorney to rebut the charge of malice, need not lay all the facts before him, but he must lay before him all the facts within his knowledge, and which he could ascertain by the exercise of reasonable diligence.—*Idem*.
6. **Malice—EVIDENCE**—Malice essential to an action for malicious prosecution may be, but is not necessarily to be, inferred from want of probable cause.—*Idem*.

MANDAMUS—See RAIL. ⁴.

MASTER AND SERVANT—See RAIL. ⁹, ¹⁰.

1. **Fellow Servants—DELEGATED AUTHORITY**—A master cannot escape responsibility for the negligent performance of his duty to provide his employe with a reasonably safe place to work in, by delegating such duty to fellow servants of such employe. Under such circumstances, these become the agents of the master.—*Blazenic v. Iowa & W. Coal Co.*, 706.
2. **Law of the Case—Contributory Negligence**—A miner is not, as matter of law, guilty of contributory negligence precluding recovery for injuries inflicted by the fall of slate from the roof of the entry to the mine merely because he made no attempt to inform himself of the actual condition of the roof, where the instructions say, simply, that he could not recover if, by the exercise of ordinary care, he could have ascertained the dangerous condition of the entry. Such charge left the jury at liberty to find due care, though no such attempt was made.—*Idem*.

MAXIMS—See PARTY WALLS, ⁷.

MAXIMUM RATES—See RAIL. ¹⁰.

MAYORS—See MUN. CORP. ¹².

MECHANIC'S LIEN—See page 733; EVID. ⁶⁴; INSURANCE, ¹⁰; PARTY WALLS, ⁶; PRACT. ¹¹.

MISCONDUCT OF COUNSEL—See CRIM. LAW, ⁴²; PRACT. SUP. CT. ²², ²⁶.

Small figures refer to subdivisions of Index. The others to page of report.

MORTG.

MORTGAGE—See INSURANCE, 11; JUDGMENTS, 4; WAIVER, 1, 2, 3.

1. **Description**—A mortgage of "all notes and books of account and the claims represented thereby," sufficiently describes the property mortgaged, as between the parties.—*Kelley, Maus & Co. v. Andrews*, 119.
2. **CURE BY DELIVERY**—A defective description of personalty in a mortgage is cured by subsequent delivery of the personalty to the mortgagee, as against the creditors of the mortgagor who had no right or interest in the property at the time of the delivery.—*Idem*.
3. **Equitable Lien on Insurance Money—Innocent Purchaser**—A mortgagee of insured property whose mortgage contains covenants that the mortgagor will keep the property insured for his benefit, has an equitable lien upon the proceeds of a policy of insurance on the property, as against an assignee of the policy after a loss, who knew of the mortgage and the covenant and his claim thereunder, and is entitled to a personal judgment against the latter, who has received the full proceeds of the policy, to the extent of such equitable lien.—*Heins v. Lincoln*, 396.
4. **Release—INNOCENT PURCHASER**—A purchaser in good faith of land conveyed by a deed of trust, who relies upon the recorded satisfaction by the trustee of the notes and deed of trust, purporting to be executed after the notes had matured and reciting the receipt of payment, is entitled to protection against the *cestui que* trust or their assignees, although the notes had not in fact been paid and the trustee had therefore no authority to satisfy the deed.—*Day v. Brenton*, 482.
5. **RELEASE BY TRUSTEE**—Where one of the joint owners of land assumes a mortgage subject to which it was purchased, and gives to one of his co-owners a trust deed to secure payment thereof, a decree, in a suit between the grantor in such trust deed and the trustee for partition and an accounting, that such grantor was bound to pay the mortgage and that on payment thereof "the clerk of the court" should satisfy the trust deed, does not deprive the trustee of power to satisfy it, the beneficiaries not being parties.—*Idem*.
6. **SAME**—Since the right of the trustee to satisfy the trust deed could not be abridged in such suit, its pendency did not affect the rights of one purchasing the land, relying on the satisfaction by the trustee.—*Idem*.
7. **Sharing Expense of Suit**—A mortgagee who receives most of the proceeds of a policy of insurance on the insured property, should bear with the assignee of the policy, whose rights are

MORTG. Continued

TO

MUN. CORP.

subordinate to his own, part of the expense incurred by her in an action in which she recovered the proceeds of the policy and made them available to the mortgagee.—*Heins v. Lincoln*, 396.

8. **Splitting Cause of Action**—A mortgagee who forecloses his mortgage in an independent suit without asking to recover for taxes paid under a provision of the mortgage, cannot assign the claim for taxes and vest in his assignee the right to recover them, as that would allow the splitting of a cause of action.—*Day v. Brenton*, 482.

MULCT LAW—See PRACT. SUP. CT. ^{20, 25}; TAXATION, ¹.

1. **Recovery on Bond**—The sureties on a bond given by a liquor dealer under Acts Twenty-fifth General Assembly, chapter 62, section 17, conditioned on the faithful observance by the principal of all the provisions of such act, are liable for the tax imposed by section 11, where the principal fails to pay the same.—*Marshall County v. Knoll*, 573.
2. **Tax—Personal Liability**—The tax imposed by the mulct law (Laws 1894, chapter 62, section 11) on liquor dealers, which it provides "shall be assessed against every person, partnership or corporation" engaged in the business, creates a personal liability on the part of the debtor, which may be enforced by an ordinary action, notwithstanding the lien also given therefore on the real estate wherein the liquors are sold, and on all personal property used in connection with the business.—*Idem*.

MUNICIPAL CORPORATIONS—See DAMAGES, ⁴; EVID. ⁴; JURORS; NEGLIGENCE, ^{1, 2, 3, 4}; RAIL. ¹; TAXATION, ¹.

1. **Highways**—A city must exercise its power to lower the grade of a street in the manner prescribed by the statutes conferring such power and when the street is cut down without conforming to such statutes, it is liable for any resulting injury to the abutting property owners.—*Blanden v. City of Ft. Dodge*, 441.
2. **SAME**—A city cannot avoid liability to an abutting property owner for the removal of shade trees in the street in front of his property, on the ground that they were a nuisance and obstructed travel, where it assumed to act under invalid proceedings to establish a grade.—*Idem*.
3. **SAME**—A municipal corporation can exercise its power to establish a street grade only by an ordinance or other legislative action.—*Idem*.
4. **SAME**—A resolution of a city council "that a permanent grade be, and the same is, hereby established," on a certain street, "except where already established, and the committee on

MUN. CORP. Continued

- streets and alleys is hereby authorized to employ a competent engineer at once to establish said permanent grade as above described," is not an establishment of the grade, but is merely a provision for establishing it in the future.—*Idem*.
5. **ESTOPPEL OF OWNER**—An abutting property owner is not estopped to complain of the lowering of a grade of the street and the removal and injury of shade trees in front of his premises, under invalid proceedings of the city council, because with a view of saving the trees, he urged those in charge of the work to make as little cut in the street as possible, and to allow him to lower the trees.—*Idem*.
 6. **Municipal Debts—CONSTITUTIONAL LAW—Refunding**—The issuance by a city of long time interest bearing bonds in payment of its current debts evidenced by city warrants, is not authorized by a provision in the city charter authorizing a city council to "borrow money for any object or purpose in their discretion and to pledge the faith of the city for the payment thereof," and also authorizing it to levy taxes for the payment of such warrants.—*Sioux City v. Weare*, 59 Iowa, 98, distinguished and explained.—*Heins v. Lincoln*, 69.
 7. **SAME**—An ordinance by a city whose indebtedness exceeds the constitutional limit, authorizing the issuance and selling of bonds, putting the cash in the treasury and thereafter redeeming old bonds therewith, is void, as authorizing the creation of a debt beyond the constitutional limit.—*Idem*.
 8. **EXCHANGE**—Where a city seeks to refund outstanding bonds, and its debt has reached the constitutional limit, it may, by a proper resolution, without increasing its debt, place the refunding bonds, properly executed, in the hands of a trustee, with power to deliver new bonds when the old bonds have been delivered to the trustee and cancelled.—*Idem*.
 9. **CONSTRUCTION OF STATUTE**—Acts Seventeenth General Assembly, chapter 58, provides for refunding bonded indebtedness and requires an annual tax to pay interest and part of the principal. It was made applicable to cities under special charters, by Acts Eighteenth General Assembly, chapter 140. Acts Twenty-second General Assembly, chapter 19, paragraphs 1, 7, provide that cities under special charter may refund debts "evidenced by bonds heretofore issued and outstanding," and that the powers conferred by said Acts of the Seventeenth General Assembly shall not be impaired. *Held*, refunding bonds could, in turn, be refunded, though the requirement of Acts Seventeenth General Assembly, as to levying a tax, had not been complied with.—*Idem*.

MUN. CORP. Continued

to

NEGLIGENCE

10. **PRESUMPTIONS**—A judgment against a school district, on orders issued in payment of other valid orders, though rendered at a time when the outstanding obligations of the district are in excess of the constitutional limit, does not create an indebtedness, within the inhibition of the constitution. It will be presumed, in the absence of evidence to the contrary, that the debt was within the maximum limit when the orders were issued.—*Thompson v. District of Allison*, 94.
11. **EXCESSIVE INTEREST—BONDS**—The fact that bonds issued by a school district in payment of a valid judgment against it, drew semi-annual interest, at ten per cent. per annum, and that the aggregate amount thus agreed to be paid, in excess of the judgment, creates an indebtedness beyond the constitutional limit, will not prevent recovery of the amount of the bonds, with semi-annual interest at six per cent. per annum.—*Idem*.
12. **RESOLUTIONS—Mayor**—A resolution by a city council providing for the exchange of new bonds of the city for old bonds and outstanding warrants is invalid unless signed by the mayor or passed over his veto, under Acts Twentieth General Assembly, chapter 192, section 1, providing that the mayor shall sign every resolution passed by any city of the first and second classes, before it takes effect.—*Heins v. Lincoln*, 69.
13. **Railroad Crossings**—In the absence of express legislation, a railroad company cannot be required to construct crossings over its right of way in order to prolong or connect streets established after the location and acquisition of the right of way.—*City of Albia v. C., B. & Q. R'y Co.*, 624.
14. **SAME**—An incorporated city or town may lay out and establish streets over a railroad right of way to the same extent as over other private property.—*Idem*.

MURDER—See CRIM. LAW, 1, 15, 22, 27, 40, 44, 47; PRACT. SUP. CT. 7.

NEGLIGENCE—See CONTRIBUTORY NEGLIGENCE; MASTER AND SERVANT; MUN. CORP; PLEA AND PROOF; PRACT. 1; RAIL. 17, 18.

1. **Highways—MUNICIPAL CORPORATIONS**—A city is chargeable with knowledge of the existence of the use of an unfastened billboard weighing one hundred and forty pounds, at the entrance of an opera-house near the sidewalk, and of the danger of its being blown over by a wind, where it has been so used for four or five months.—*Cason v. City of Ottumwa*, 99.
2. **NOTICE**—Evidence as to the places where a billboard, by the blowing over of which plaintiff was injured, had been kept,

Small figures refer to subdivisions of Index. The others to page of report.

NEGLIGENCE Continued

TO

NEGO. INST.

at different times, is admissible in an action against the city, to show how such board was used and that it had been used for such time before the accident that the city was chargeable with notice of its use.—*Idem*.

3. CONTRIBUTORY NEGLIGENCE—One is not as a matter of law, guilty of contributory negligence in passing an unfastened billboard, weighing one hundred and forty pounds, without thinking of and guarding against the danger from it, on a day on which a strong wind is blowing; it not being clearly shown that there was anything unusual in the strength of the wind which blew the billboard over upon the plaintiff.—*Idem*.
4. Verdict—Evidence—A verdict that a city was negligent in allowing a billboard to stand on the sidewalk is sustained by evidence that it was 4x8 feet in size, and weighed one hundred and forty pounds; that, when not in actual use in front of the building, it was so placed that the top rested against the side wall, while the bottom rested a few inches from it on the sidewalk; that it was not fastened in any way; and that it had been so used and kept for such a length of time that the city was chargeable with knowledge of it.—*Idem*.

NEGOTIABLE INSTRUMENTS—See EVID. ²; PRIN. AND SURETY, ¹.

1. Indorsement Without Recourse—MISREPRESENTATIONS—*Rescission*—Where representations of the assignor of notes secured by mortgage on land in another state, with reference to the land and notes, were expressions of opinion, and based on information only, and the assignee investigated the value of the land and the notes, without hindrance by the assignee, and lived three years after without making complaint, and it was not shown that he did not know that the notes were worthless when he purchased them, his representatives were not entitled to rescind on the ground of fraudulent representations as to the value of the notes. Such case is not within the rule that one who indorses worthless paper without recourse is liable for the consideration received, when the indorser does, and the indorsee does not, know the paper to be worthless.—*Brown v. Zackary*, 433.
2. ADMISSIONS—A letter, written by the assignor to the assignee shortly before the transaction, in which he said: "I took this paper myself and know it to be good, and a good man behind it," would not be presumed to refer to the notes in suit, in the absence of evidence.—*Idem*.

Small figures refer to subdivisions of Index. The others to page of report.

NEW TRIAL

TO

OFFICE AND OFFICERS

NEW TRIAL—See CRIM. LAW, ⁴⁸, ⁴⁹; PRACT. SUP. CT. ¹¹.

1. **Appeal**—*Bill of Exceptions*—Code, chapter 1, title 19, sections 8155, 8158, providing that petitions for new trials shall be tried "as other actions by ordinary proceedings," applies whether the original action was an ordinary or an equitable proceeding, unless the parties otherwise agree; and hence, the minutes of the evidence taken in the proceedings for new trial, though certified to by the judge, cannot be considered on appeal, unless signed and filed during the term, or in such time thereafter as may be fixed by the court, as required in respect to a bill of exceptions.—*Markley v. Owen*, 492.
2. **Drinking by Juror**—A new trial will not be granted simply because some of the jurors drink beer while the trial is in progress.—*Hemmi v. Chicago G. W. R'y Co.*, 25.
3. **Unavoidable Casualty**—A first mortgagee was made defendant in an action to foreclose a second mortgage, and employed an attorney, who filed an answer in such case and agreed to appear and defend. Five days before suit was tried the attorney absconded without the knowledge of his client, and the case was tried without any evidence being offered, resulting in judgment foreclosing the mortgage and making the first mortgagee subject thereto. *Held*, unavoidable casualty and misfortune, within Code, section 8154, entitling the mortgagee to have the decree set aside.—*Ennis v. Building Association*, 520.

NOMINAL DAMAGES—See PRACT. SUP. CT. ¹⁸, ¹⁹.

NOTICE—See DAMAGES, ¹³; GARNISHMENT, ³; HIGHWAYS; INSUR. ¹⁷; NEGLIGENCE, ¹, ²; PRACT. SUP. CT. ³⁰.

OBJECTIONS—See EVID. ⁴, ²¹, ³¹, ³²; PRACT. ²⁰, ²¹; PRACT. SUP. CT. ²², ²³, ²⁴, ²⁵, ²⁸, ³⁰.

OFFICE AND OFFICER—See CRIM. LAW, ⁷, ⁸, ⁹, ¹⁰.

1. An oath of office, salary or fees, and a fixed term of duration or continuance are, generally, though not necessarily, attached to a public office.—*State of Iowa v. Spaulding*, 639.
2. **Oil Inspector**—*Duties Ministerial*—The liability of an inspector of illuminating oil, whose duties are prescribed by statute and rules and regulations adopted in accordance with statutory provisions, for injuries caused by insufficient testing of oil, is statutory.—*Idem*.
3. **FALSE BRAND**—*Error*—Falsely branding illuminating oil, for which the statute makes the inspector both civilly and criminally liable, involves intentional falsehood, and not mere error or unintentional wrong.—*Idem*.

Small figures refer to subdivision of Index. The others to page of report.

OFFICE AND OFFICERS Continued TO PARTNERSHIP

4. *Same*—An inspector of illuminating oil is not liable for injuries caused by the use of oil which he erroneously marks as of a certain test, if he has used instruments furnished and approved by the proper authorities, and which he had no reason to believe were not in good order, and which he used with due care in the manner prescribed by law, although by reason of their use he erroneously marked the temperature at which the oil would flash too high,—although his duties are purely ministerial, and though the statute makes him liable for “culpable negligence.”—*Idem*.

OIL INSPECTOR—See DAMAGES, ¹¹; EVID. ¹; OFFICE AND OFFICER, ², ³, ⁴.

ORDINANCES—See MUN. CORP. ³, ⁴.

PARENT AND CHILD—See EVID. ¹¹.

PARTITION—See ATTORNEYS, ³; CO-TENANCY, ⁴; JUDGMENTS, ⁵; PRACT. ²²; PRACT. SUP. CT. ¹¹; SALES, ¹.

1. **Advancement**—The mere fact that a conveyance of land from father to son was intended as an advancement does not prevent the latter from maintaining an action for the partition of other land left by the father on his death.—*Van Ormer v. Harley*, 150.
2. **Amended Petition**—An action was brought to procure an adjudication of rights of the parties in certain lands. The original petition was not framed for the purposes of a partition suit and did not have an abstract of title attached, as Code, sections 3278, and 3279, require. After all the evidence was in, plaintiff amended, asking partition. The amendment to petition had no abstract attached. *Held*, said statutes are mandatory and it was error to grant partition.—*Darr v. Darr*, 458.
3. **Costs**—Under McClain's Code, sections 4517, 4581, providing that when issues are joined in partition the question of costs must be determined as in other suits, where plaintiffs plead advancements made to defendants, which defendants deny, and finding is made for plaintiff, costs in the lower court, after filing defendants' answer, should be taxed to them.—*Finch v. Garrett*, 381.

PARTNERSHIP—See PLEADINGS, ¹.

A partnership, as against third persons, is created by an agreement whereby the parties of the first part are to furnish a specified sum in installments during the ensuing year for the purpose of manufacturing a specified number of articles of a

PARTY WALLS

pattern invented by the second party, and to share the profits in a certain proportion with the second party, notwithstanding a further provision that if the venture is not a success the first parties may declare the agreement of no effect and receive such part of the amount contributed as may be made out of the sale of manufactured articles.—*Illinois Iron Co. v. Reed*, 588.

PARTY WALLS.

1. **Constitutional Law**—The provisions as to party-walls in Code, sections 2019, 2020 and 2027, giving a lot owner a right to build a wall not more than eighteen inches wide, one-half upon the land of his neighbor, and to recover from the neighbor one-half the expense thereof when the latter shall use the wall, cannot be held so plainly in violation of the constitutional provision prohibiting private property to be taken for private use without compensation, that they can be held invalid after more than forty years recognition and enforcement, although their validity is not free from doubt; but they must be upheld as an exercise of the police power and as resting on the principle that equality is equity.—*Swift v. Calnan*, 206.
2. **Contract in Parol**—A parol contract as to a party-wall which is not different from that which the law makes, is not invalid under Code, section 2030, which provides that special agreements about such walls must be in writing.—*Idem*.
3. **Contribution**—Under McClain's Code, section 3195, providing that, where a person builds a partition wall, the adjoining owner "may make it a wall in common by paying one-half of the appraised cost at the time of using it," the erection of a temporary shed, ten feet high and open on two sides, with one end of its batten roof resting on a 2x6 scantling, nailed to a two-story partition wall on the adjoining lot, is not such an appropriation of the wall as will charge the owner of the shed with contribution, or justify his grantee in assuming that such contribution has been paid, so as to entitle him to make permanent use of the partition wall without contributing to its cost.—*Beggs v. Duling*, 18.
4. **SAME**—Under said statute, an appropriation of but five feet of a two-story partition wall ninety feet long, by the erection of a one-story stable, will not justify charging the owner of the stable with one-half of the cost of the entire wall.—*Idem*.
5. **Express Promise to Reimburse**—One who builds a party-wall partly on the land of a neighbor on the latter's express promise to pay one-half of the expense thereof, when he shall use it, may recover upon the promise at common law.—*Swift v. Calnan*, 206.

PARTY WALLS

TO

PLEAD.

6. **MECHANIC'S LIEN**—Though an express promise to pay half the expense of building a party-wall is enforceable, no mechanic's lien can be had to secure the said half cost.—*Idem*.
7. **Maxims**—These statutes and this holding rest on the equitable principle that equality is equity, and that where there is equality in right, there should be equality of burden.—*Beggs v. Duling*, 18.

PAYMENT—See EVID. ⁴⁸.

PHYSICIANS—See WILLS, ¹.

PLEA AND PROOF.

1. **Negligence**—An averment that defendant had actual knowledge of a fact does not preclude proof that defendant was negligent, through its failure to exercise ordinary care to know such fact, as such proof would not be inconsistent with said averment.—*Blazenic v. Iowa & W. Coal Co.*, 706.
2. **Ownership**—Proof of qualified interest will not warrant a recovery of possession upon a plea of absolute ownership.—*Plow Co. v. Clark*, 44.
3. **Suretyship**—Where, in an action against sureties on a note, they plead that certain sureties who were to sign had not signed, conversations between the sureties are admissible to show such fact, where plaintiff had knowledge thereof when he took the note.—*Weis v. Morris Bros.*, 327.

PLEADINGS—See BREACH OF PROMISE, ¹; EVID. ⁴⁰; PRACT. ¹, ².

1. **Construction Of—Landlord and Tenant**—A complaint by a lessor set out a provision of the lease, that if the lessee held over after a forfeiture, he should pay a certain sum per day as liquidated damages, and alleged damages by failure to pay rent, and that lessee held over, and that such sum per day was justly due. It did not allege an election to declare a forfeiture, nor, in terms, that the sum claimed was for liquidated damages. *Held*, that an answer denying that any sum was due to plaintiff under the lease, was sufficient to put in issue the question whether plaintiff's claim was for liquidated damages, or a penalty.—*Parsons v. Wright*, 473.
2. **PARTNERSHIP**—The title of a petition set out as parties defendant the name of a firm, followed by the names of three individuals who were proven to be members of the firm, and the amended petition alleged that the defendant named as a firm was a co-partnership, and the individual members did not deny liability as members of the firm. *Held*, that the pleading was sufficient to sustain a judgment against the co-part-

Small figures refer to subdivisions of Index. The others to page of report.

PLEAD. Continued

TO

PRAO.

nership and the individuals thereof.—*McDonald v. Franchere Bros.*, 496.

8. **Counts**—Where a petition by a carrier in one count sets out a cause of action for freight charges under a contract of defendant with the consignee to pay them, the fact that it necessarily avers a shipment by defendant, and the amount of the freight charges thereon, does not authorize the presumption that it was intended thereby to state a second cause of action independent of the contract; and such pleading is not violative of Code, section 2646, requiring causes of action to be separately stated.—*C., R. I. & P. R'y Co. v. Haywood & Son*, 392.
4. **Demurrer**—**WHAT CONFESSED BY**—An allegation that a devise was accepted in lieu of dower is a mere conclusion, and is not confessed by demurrer to the pleading containing it which states no facts to sustain such conclusion.—*Sutherland v. Sutherland*, 535.
5. **APPEAL**—*Treating Exhibit as Attached to Pleading Demurred To*—Where defendants, in their answer, rest their defense on the provisions of a probated will, and "make the will * * * a part of this answer, and refer to the same as part of this answer," without setting out or attaching a copy, on appeal, they will not be heard to say that the will is not a part of the answer.—*Idem*.
6. **Partition**—**AMENDED PETITION**—An action was brought to procure an adjudication of rights of the parties in certain lands. The original petition was not framed for the purposes of a partition suit, and did not have an abstract of title attached, as Code, sections 3278 and 3279, require. After all the evidence was in, plaintiff amended, asking partition. The amendment to petition had no abstract attached. *Held*, said statutes are mandatory, and it was error to grant partition.—*Darr v. Darr*, 453.
7. **Waiver by Pleading Over**—Where a pleading is amended so as to make it good against a sustained demurrer and issue is joined on the amendment, error in sustaining the demurrer is waived. See chapter 96, Acts Twenty-fifth General Assembly.—*Geiger v. Payne*, 581.

PLEA OF GUILTY—See **DAMAGES**, ²; **EVID.**, ², ³.

PRACTICE—See **COSTS**, ¹, ²; **CRIM. LAW**, ²⁸, ⁴²; **EMINENT DOMAIN**; **ESTATES**, ²; **EVID.**, ³, ⁴, ⁵, ²⁸, ³¹, ³²; **GARNISHMENTS**, ²; **JUDGMENTS**, ²; **JURORS**; **LIM. OF ACT.**; **NEW TRIAL**, ²; **PLEA AND PROOF**; **PRACT. SUP. CT.** ²², ²³, ²⁴; **RAIL.** ¹⁷; **SEARCH WARRANTS**; **STOCKHOLDERS LIABILITY**, ¹; **WARRANTY**.

Small figures refer to subdivisions of Index. The others to page of report.

PRAC. Continued

1. **Amendment in Trial—PLEADING**—A trial amendment to the petition in an action for personal injuries, which does not change the claim originally made, except to allege some effects of the accident, which had not been originally stated, and to show that some were more serious than they were first claimed to be, will not be stricken out on motion made two days after the amendment is filed, and after evidence in support of the amendment has been introduced.—*Cason v. City of Ottumwa*, 99.
2. **SURPRISE**—Defendants are properly allowed, after the evidence is all in, to amend their answer in an action on a note so as to set up that the note had been altered by inserting the figure "8" over the word "ten" in the clause providing for interest on interest due and unpaid, where no claim of surprise is made or continuance asked for.—*Weis v. Morris Bros.*, 327.
3. **Condition Precedent to Suit on Policy—APPRAISEMENT**—In the absence of a statute to the contrary, clauses in an insurance policy providing for an appraisal before suit is brought must be complied with by the assured before he can commence suit on the policy; and suit before so complying is premature.—*Zalesky v. Home Insurance Co.*, 618.
4. **Continuances**—See *ante*, ²—Refusal of continuance on account of the death of defendant's chief attorney was proper, where the cause had been several times continued at defendant's instance and the illness of the attorney, and had existed for such a period, that his presence at the trial ought not to have been expected.—*Geiger v. Payne*, 581.
5. **SAME**—It is error to grant a continuance to permit plaintiff to demand an appraisal which could in no event avail him.—*Zalesky v. Home Insurance Co.*, 618.

Cross Examination—See *post*, ²⁰

Default—See *post*, ²⁴.

6. **Demurrer—ELECTION TO STAND ON**—Where a demurrer to a petition was sustained immediately before adjournment of the term, and an exception was then taken, the court did not abuse its discretion in permitting plaintiff to have till the next term in which to elect whether to plead further or stand on his petition.—*Nelson v. Hamilton County*, 229.
7. **PLEADING OVER—Waiver**—Possible error in overruling a demurrer to the petition is waived by filing an answer.—*Foley & Paul v. Hotel Association*, 272.

Depositions—See *post*, ²¹.

Election—See *ante*, ⁶.

PRAO. Continued

Equity and Law—See *post*, ²⁷.

8. **Estoppel**—MANDAMUS—*Carriers*—The fact that a railway company based its refusal of a shipper's request that it receive the the cars of a connecting road for transportation over its line, as required by McClain's Code, section 2039, on the ground that it did not want to do business with such company, does not prevent it from relying upon any legal excuse it had for its refusal, in a proceeding by mandamus, to compel it to receive such cars.—Green Bay Lumber Co. v. C., R. I. & P. R'y Co., 292.
 9. **Garnishment**—RECALLING GARNISHEE—Plaintiff's motion for leave to further examine the garnishee, made on a jury trial of issues joined on the garnishee's examination, is properly denied, since new issues might be opened, and the examination of the garnishee is not a matter for the jury.—Kelley, Maus & Co. v. Andrews, 119.
- Insurance**—See *ante*, ¹.
10. **Joinder of Cause and Parties**—See *post*, ²⁸—*Insurance Commission*—General agents for an insurance company and a local agent of such company who retain and convert to their own use all the commissions for obtaining an application for life insurance, are jointly liable to one who acted with the local agent in effecting the insurance under an agreement by the local agent to pay him half the commission earned, ratified by the general agents.—Farmer v. Brokaw, 246.
 11. **Judgments**—*Liens*—Plaintiff, in an action to establish a lien against a wife's property for material furnished under a contract with her husband is entitled to a judgment establishing his lien as a mechanic's lien, and not as a mere equitable lien, where the husband and wife make default and a mortgagee of the property who contests the priority of the lien over his mortgage does not question that if plaintiff's lien is to be established, it should be established as a mechanic's lien.—Townsend v. White, 477.
 12. **DEFAULT**—*Vacation*—Where the notice stated that a petition would be filed on or before December 1 (which was Sunday), and that the term would begin on December 9, and the petition was filed November 29, more than ten clear days before the term, the court had jurisdiction to render a default judgment, although December 1 was not ten clear days before the beginning of the term.—Church v. Lacy & Co., 235.
 13. **Showing of Merits**—A judgment debtor who, in response to the request of a third person who claims the benefit of a judgment, pays the amount thereof to the clerk of the court,

PRAC. Continued

- who subsequently turns the same over to the judgment creditor, is released from liability to such third person who had ample opportunity to notify the clerk of his claim, although the judgment debtor does not notify the clerk thereof.—*Heins v. Wicke*, 896.
14. *Negligence of Attorney*—Code, section 2887, subdivision 8, and section 8154, subdivisions 3, 7,—granting relief from default judgment in case of accident, surprise, unavoidable casualty, or misfortune, does not cover a case where the attorney to whom defendant submitted his case, being about to remove to another city, told defendant he would inform his partner of his wishes, and leave the matter with him, but neglected to do so through forgetfulness.—*Church v. Lacy & Co*, 289.
 15. *Judgment on Pleadings*—It is error to render judgment for plaintiff on the pleadings where material allegations of the petition are denied by answer.—*Haworth v. Newell*, 541.
 16. *Jury Question—CONFLICT*—Plaintiffs brought suit to recover their commission for furnishing a purchaser for real estate, alleging, but not proving, fraudulent conduct on the part of the defendant. Defendant did not deny the agreement, nor that plaintiffs furnished the purchaser. There was a conflict as to what was to be paid for commission. *Held*, that the plaintiffs' cause of action should have been submitted to the jury.—*Anderson et al. v. Wedeking*, 446.
 17. *Payment*—The question whether or not the plaintiff received the note of the third person in payment of the debt of defendant, may be withdrawn from the jury where plaintiff's positive testimony that he did not receive it in payment is not contradicted, and is corroborated by all the circumstances.—*Hannawalt v. Equitable Life Assurance Society*, 667.
 18. *DAMAGES*—When there is a contention between the plaintiff and defendant with respect to the amount of damages recoverable on an attachment bond, the question should be submitted to the jury.—*Anderson & Ellis v. Wedeking*, 446.
 19. *Jury Trial in Probate—Construction of Statute*—While the county court existed, jury trial therein could be demanded only in special cases allowed by statute. The acts which transferred its powers to the circuit court authorize a jury in the trial of claims. Later acts allow one in contest of probate. *Held*, it appears to be the legislative intent to limit jury trial in probate to cases where it is specially authorized, and hence jury trial is not a matter of right in a contest between a surviving husband and heirs of his wife, over the distribution of her estate.—*Duffield v. Walden*, 676.

PRAC. Continued

Law and Equity—See *post*, ⁷.

Laws—See *ante*, ¹¹.

20. **Objections**—See *post*, ²⁸—**BEST EVIDENCE**—An objection to the introduction in evidence of the record of a mortgage securing the payment of a note in suit, on the ground that it is incompetent because it does not purport to have been made by the maker of the note, and that it shows on its face that it has no materiality or relevancy to the issue, does not raise the objection that the record is secondary evidence.—*Weis v. Morris Bros.*, 327.
 21. **DEPOSITION**—Objection to the deposition of a physician on the ground that it reveals confidential communications, go to the competency of the evidence, not to the witness, and hence may be made for the first time at the trial, under Code, section 3751, requiring objections other than for "incompetency or irrelevancy" to be made at the taking of the deposition. *Greedy v. McGee*, 55 Iowa, 750, *overruled*.—*Winters v. Winters*, 58.
 22. **Order of Proof**—**DISCRETION**—The court did not abuse its discretion as to the order of proof, by allowing plaintiff to show the amount of work which he did for defendant corporation, before proving that the work was authorized.—*Foley & Paul v. Hotel Ass'n*, 273.
 23. **Partition**—*Joinder and Counter-Claim*—Where, in partition of land, defendant claims a lien on the property because of the payment of a mortgage thereon, plaintiff can ask to have a claim for rent growing out of the occupancy of the land by such defendant adjusted, though Code, section 3277, provides that there shall be no joinder or counter-claim of any other kind, in partition.—*Wilcke v. Wilcke*, 178.
- Pleading**—See *ante*, ¹; *post*, ²⁸.
- Probate**—See *ante*, ¹⁰.
24. **Remittitur**—The inclusion in a judgment by default, for failure of the defendant to appear at the return term of the original notice, of a claim not included in such notice, is not such an irregularity as justifies the setting aside of the judgment, after the plaintiff has filed a remittitur for the amount of such claim.—*Church v. Lacy & Co.*, 239.
 25. **Splitting Cause of Action**—A mortgagee who forecloses his mortgage in an independent suit without asking to recover for taxes paid under a provision of the mortgage, cannot assign the claim for taxes and vest in his assignee the right to recover them, as that would allow the splitting of the cause of action.—*Day v. Brenton*, 482.

PRAC. Continued

TO

PRAC. SUP. CT.

26. **Supplemental Petition**—Code, section 2781, providing that plaintiff may make a supplemental petition alleging facts which have happened or come to his knowledge since the filing of his petition, does not authorize the plaintiff to plead and prove a demand for an appraisal, required by the policy of insurance, sued upon, to be made before suit, after the action was commenced.—*Zalesky v. Home Insurance Co.*, 618.
27. **Transfer**—The fact that an action at law is the proper remedy is not ground for the dismissal of a suit in equity under Code, section 2514, which provides, in effect, that an error as to the kind of proceedings adopted shall not cause the abatement or dismissal of the action, but merely a change into the proper proceedings and a transfer to the proper docket.—*Swift v. Calnan*, 206.
28. **Waiver**—See *ante*, 1.—**FAILURE TO OBJECT**—The right of a wife to object to her husband testifying as to communications between them (Code, section 8642) in an action against her, is not waived by failure to object to his testifying as a witness for the adverse party on a former trial of the action, if objection is made when it is attempted to use such testimony on a second trial.—*Kelley, Maus & Co. v. Andrews*, 119.
29. **SAME**—That a party against whom incompetent testimony as to a personal transaction with a deceased person is introduced has a right to cross-examine a witness does not cure the error in admitting the testimony.—*Duffield v. Walden*, 676.

PRACTICE SUPREME COURT.

1. **Abstracts**—See *post*, 4, 20.—**Fullness**—An appeal will not be dismissed for incompleteness of the abstract if it is sufficiently full to present the facts in regard to the question to be determined.—*Foley & Paul v. Hotel Association*, 272.
2. **AMENDMENT**—An amendment to the abstract is not filed too late if the submission of the cause on the merits is not delayed.—*Idem*.
3. **Striking Amendments**—An amendment to the abstract, setting out matter to cure formal defects in the original abstract, will not be stricken out on the ground that it was filed without leave, and after the cause had been fully argued by the appellee, where the submission of the cause on the merits was not delayed thereby.—*Cason v. City of Ottumwa*, 99.

Argument—See *post*, 4, 21.

Small figures refer to subdivisions of Index. The others to page of report.

PRAC. SUP. CT. Continued

4. **Assignments of Error**—See *post*, ¹¹—**ARGUMENT OF**—Assignments of error not argued will not be reviewed.—*Mathews v. Herron*, 45.
5. **REVIEW**—An assignment of error in overruling objections to "each of the following questions and answers," followed by a page of printed questions and answers without objection, is not sufficiently specific to permit a review, the argument not stating the grounds of the objections.—*Latimer et al. v. State Bank*, 162.
6. **SUFFICIENCY**—An assignment of error in giving a specified part of an instruction is sufficient without stating in what respect it was claimed to be erroneous.—*Farmers Savings Bank v. Wilka*, 315.
7. **Bill of Exceptions**—See *post*, ²¹, ²²—The action of the trial court respecting the separation of the jury in a criminal trial, as shown by the stenographer's notes, is before the supreme court on appeal, where the bill of exceptions states that the short-hand notes contain not merely the evidence and rulings thereon, but the proceedings on the trial, and that the ruling of the court and the exceptions of the defendant are as stated in the notes, and the certificate of the judge attached to the short-hand report, making it a part of the record, states that it contains all the objections and rulings made and exceptions taken, notwithstanding that the bill of exceptions in reciting what is made a part of the record refers to the notes of the evidence and the translation thereof when made, and not to rulings and proceedings not included in the evidence.—*State of Iowa v. Smith*, 656.
8. **CERTIFICATION OF EVIDENCE**—A bill of exceptions which states merely that plaintiff "to sustain the issue upon his part, introduced the following evidence" (specifying it), and contains similar statements in regard to the evidence for defendants and in rebuttal, does not show that it contains all the evidence.—*Farmer v. Brokaw*, 246.
9. **SKELETON BILL**—A skeleton bill of exceptions directing the clerk to insert the depositions or oral testimony "as shown by the minutes of the short-hand reporter," sufficiently identifies a deposition, where the reporter's minutes, clearly identifying it and duly certified are on file; such minutes becoming a part of the record without an order.—*Winters v. Winters*, 53.
10. **Costs**—The costs of an additional abstract filed by appellee will not be taxed to the latter on affirming the judgment, where the matters set out therein, although immaterial to the questions

Small figures refer to subdivisions of Index. The others to page of report.

PRAC. SUP. CT. Continued

considered, would be material to other questions discussed and which would have been considered if the conclusions of the court on the questions considered had been different.—Fitzgerald v. Nolan, 283.

Demurrer—See *post*, ²⁵, ²⁶.

Evidence—See *ante*, ²; *post*, ²⁴, ²⁹.

11. **Exceptions**—**MOTION FOR NEW TRIAL**—An assignment that the court erred in refusing to give certain numbered instructions, "and every one of them," is sufficient to present the refusal of each request, on appeal.—Ludwig v. Blackshire, 366.
12. *Same*—No question is raised by exceptions to instruction, taken by motion for a new trial within three days, as authorized by Code, section 2789, where the exceptions do not specify the grounds of objection as required by such statute.—*Idem*.
13. **REVIEW OF INSTRUCTIONS**—No questions as to the giving of particular instructions is raised by a record showing that the court gave the "following instructions, which were duly excepted to by the defendant;" no exception being taken to particular instructions, or noted in the margin; and there being no claim that the charge, as a whole, is erroneous.
14. **Harmless Error**—See *post*, ¹⁸—A judgment will not be reversed for the admission of immaterial evidence which was not prejudicial.—Hauser v. Griffith, 215.
15. *SAME*—Judges of election cannot complain, on appeal from a conviction under Code, 1873, section 4074, for wilfully refusing a vote of a person who complied with the requisites prescribed by law to prove his qualifications, of an instruction which requires that the refusal shall have been without just grounds for believing it to be wilful, as the error is favorable to them.—State of Iowa v. Clark, 635.

Instructions—See *ante*, ¹⁹.

16. **Juror**—Excusing a juror on a challenge for cause is not error where the juror's daughter had married a relative of one of the parties, and the juror had talked with such son-in-law about the case, particularly where no prejudice therefrom is shown to have resulted to the complaining party.—Geiger v. Payne, 581.
17. **Mandate and Proceedings Below**—**SUPPLEMENTAL PETITION**—*Partition*—Where a decree in partition, fixing the respective interests of the parties, and, as incidental relief, allowing plaintiffs for rents and profits up to the time of the trial, was modified on appeal, as to said interests, and remanded for proceedings in accordance with the opinion, a supplemental petition filed in the lower court, alleging defendant's continued possession of the property after the trial, and requiring him to

PRAC. SUP. CT. Continued

account for rents and profits accruing since that time, did not set up a new cause of action, and the relief so demanded was properly given on final decree.—*Leach v. Building Association*, 125.

Misconduct—See *post*, ³¹, ³², ³³.

18. **Nominal Damages**—*Harmless Error*—While a verdict for one dollar for causing the death of a fireman, is not warranted, it will not be disturbed where there should have been no recovery whatever.—*Cox v. C. & N. W. R'y Co.*, 711.
19. **SAME**—*Review*—Such a verdict is, in fact, a verdict for defendant, hence, on appeal of plaintiff, he is not confined to urging the smallness of the recovery, but may present any point, which he could have urged had the verdict been for the defendant.—*Idem*.
20. **Notice of Defendant**—**MULCT LAW BOND**—Under Code, 2550, providing that where two or more persons are bound by contract, including the parties to negotiable paper and sureties on the same or separate instruments, the action may, at plaintiff's option be brought against any or all of them, and section 2551, providing that the court may determine any controversy between the parties before it, where it can be done without prejudice to the rights of others, an appeal by plaintiff in an action on a liquor bond will not be dismissed because notice of appeal was not served on the principal in the bond although he was named as defendant, where he was not an actual party to the proceeding in the trial court.—*Marshall County v. Knoll* 573.
- Objections**—See *ant*, ⁵, ¹¹.
21. **ARGUMENTS**—In civil cases, objections not discussed in argument, will not be considered — *Cason v. City of Ottumwa*, 99.
22. **CONSTRUED**—*Books of Account*—Where the objection to admission in evidence of books of account of an hotel keeper, to prove payment of certain cash items contained therein, is on the ground merely that proper preliminary proof was not made, the objection that cash items in books of account of one not a broker or banker cannot be thus proven, cannot be raised on appeal.—*Mathews v. Herron*, 45.
23. **Same**—Objection to an offer of an account book, and especially of certain pages thereof: "To which offer the defendants object as incompetent, immaterial, as to each and every item in said testimony, and to each and every item on the book, and on the pages referred to as incompetent and immaterial. The proper foundation has not been laid as for the introduction of the testimony offered,"—is merely an

PRAC. SUP. CT. Continued

- objection for want of proper foundation, and does not raise the point that certain items of cash payments therein shown were not admissible to show payments of notes involved.—*Idem*.
24. *Same*—An objection to the admission in evidence of certain books of account as incompetent and immaterial, ‘as to each and every item’ because the proper foundation has not been laid, is properly overruled where the proper foundation has been laid, and some of the items are competent —*Idem*.
25. OBJECTION BELOW—*Demurrer*—An objection, that the petition in an action on a bond to recover the amount of a tax levied on account of the sale of intoxicating liquors does not show that the tax cannot be collected from the personal property used in the business or that the liquor dealer giving the bonds is insolvent, should be presented by demurrer. (See chapter 93, Twenty-fifth General Assembly).—*Marshall County v. Knoll*, 573.
26. METHOD OF ADJUDICATION—An objection to the method of adjudication cannot be first raised on appeal.—*Logan v. McCahan*, 241.
27. MUTILATION OF RECORD—Where appellant’s counsel, without leave, removed certain exhibits from the transcript after it had been used by the court below, but the transcript as certified appears to contain all such exhibits, and no application was made below to correct the supposed deficiencies, a motion to strike out the evidence because of the alleged mutilation of the records will be denied.—*Van Ormer v. Harley*, 150.
28. WAIVER OF OBJECTION—A party will not be heard to complain on appeal of the admission of evidence over his objection on the trial, where, after its admission, he opposed a motion to have it stricken out, and the jury instructed to disregard it.—*Geiger v. Payne*, 581.
29. *Failure to Demur*—Where plaintiff objects to the filing of an amendment to an answer on the ground that the evidence was all in, and both parties offer evidence as to the matter in the amendment without objection, and plaintiff moves to take the defense under such amendment from the jury because the evidence was not sufficient to sustain it, and offers instructions as to what must be shown to establish the defense, he cannot, on appeal, first raise the question that the amendment does not set up a good defense. While a failure to demur no longer constitutes a waiver, the first complaint of action below cannot be made on appeal —*Weis v. Morris Bros.*, 327.

PRAC. SUP. CT. Continued

- 30. Presumptions**—The absence from the record of conditions under which prejudices might arise from a particular ruling, justifies the conclusion that there was no prejudice.—*Hauser v. Smith*, 215.
- Review**—See *ante*, ⁷, ⁸, ⁹, ¹³, ¹⁶.
- 31. Bill of Exceptions—Misconduct of Counsel**—Alleged misconduct of an attorney in his closing argument, set out only in affidavits, cannot be considered on appeal where the bill of exceptions does not show what the objectionable statements of the attorney were.—*Farmer v. Brokaw*, 246.
- 32. REMARKS OF COURT**—Remarks of the trial judge cannot be presented to the supreme court, on appeal, by an affidavit of counsel not made a part of the record by bill of exceptions or otherwise.—*State of Iowa v. Watson*, 651.
- 33. DEMURRER**—In a suit on a fire insurance policy defendant set up by answer a demand for an appraisal, and refusal, to which plaintiff demurred, and demurrer was overruled, from which no appeal was taken, and the question was not afterwards raised on the trial. *Held*, that the overruling of the demurrer, not being appealed from, was an adjudication that the facts stated by the defendant's answer were sufficient to constitute a defense, and whether a statutory provision would render such facts pleaded in answer insufficient as a defense cannot be determined on appeal.—*Zalesky v. Home Insurance Co*, 613.
- 34. EVIDENCE—Transcript and Abstract**—On appeal errors assigned were that the court erred in taking all questions from the jury except one, in giving each of the instructions given on its own motion, and in overruling defendant's motion for a new trial. What was said concerning them in appellant's argument was based on the evidence. *Held*, that the contentions could not be considered where the abstracts conflicted without reaffirmance by appellant, and in the absence of a transcript of the evidence.—*Implement Co. v. Manufacturing Co*, 890.
- 35. Appeal—Findings**—A finding by the court as to the true location of a street will not be reversed on appeal, although the evidence is not harmonious, where, after eliminating objections to the admissibility of the evidence not well taken, the court's conclusion cannot be said to be doubtful.—*Morse et al. v. City of Dubuque, et al.*, 742.
- 36. MISCONDUCT OF COUNSEL**—A judgment will not be reversed because of counsel's denunciation of defendant's conduct and character, in his argument to the jury, if the proof tends to sustain, though it may not actually establish the truth of the

Small figures refer to subdivisions of Index. The others to page of report.

PRAC. SUP. CT. Continued

TO

PRIN. AND SURETY

charges so made. It is not intended by this to justify personal abuse by counsel, but to hold that in this case, upon consideration of the whole record, there was no abuse for the sake of abuse, and that the discretion of the court in its control of argument by counsel was not abused.—*Geiger v. Payne*, 581.

37. **VERDICT**—The supreme court will not disturb a verdict if it is sustained by the evidence, although the court, sitting as jurors, might have reached a different result.—*Ludwig v. Blackshire*, 366.

Transcripts—See *ante*, 24.

38. **CONFLICTS IN ABSTRACTS**—*Duty to Furnish Transcript*—Where there is an issue as to the sufficiency of the abstract, the burden is upon the appellant to provide a transcript of the record, and for failure to do so the appeal must be dismissed.—*Cord v. Barry*, 809.

39. **Trial de Novo**—**RECORD OF EVIDENCE**—Where an equity case is appealed for trial *de novo*, the abstract must show that it contains all the evidence offered, whether received or rejected by the lower court.—*Wallick v. Pierce*, 746.

Verdict—See *ante*, 19, 27.

PRESIDENTS—See **PRINCIPAL AND AGENT**, 3.

PRESUMPTIONS—See **EVID.** 43, 44, 45; **MUN. CORP.** 10; **RAIL.** 17.

PRINCIPAL AND AGENT.

1. **Assault by Clerk**—A clerk, undertaking to obtain from a customer an article that he believed was stolen is so acting within the scope of his employment as to render his employers liable for an assault thereby committed.—*McDonald v. Franchere Bros.*, 496.
2. **Authority**—It is no defense to an action on a note that defendants delivered to a third person, by plaintiff's authority, a note secured by chattel mortgage, as collateral security for the note in suit, and that such third person collected the collateral note by foreclosure of the mortgage, where he had no authority from plaintiff to collect it.—*St. Paul & K. C. Grain Co. v. Rudd et al.*, 748.
3. **POWER OF BANK PRESIDENT**—Where a president of a bank acted in its behalf in procuring an acceptance, declarations made by him in regard to the transaction after the acceptance was made, were not admissible against the bank, since, at the time they were made, the president's power to bind the bank had ceased.—*First National Bank v. Booth*, 333.

PRINCIPAL AND SURETY—See page 748; **CONTRACTS**, 10; **EVID.** 19; **FRAUD. CONV.** 4; **INSUR.** 4; **SALES**, 10.

Small figures refer to subdivisions of Index. The others to page of report.

PRIN. AND SURETY Continued

TO

RAIL.

1. **Bonds--Delivery**—Where a surety signs a bond, with an agreement that it should not be delivered until another, whose signature is not obtained, should sign as co-surety, and never authorizes a delivery, there is no liability.—*Johnston v. Cole*, 109.
2. **Contribution**—One of the two joint makers of a note, each of whom received one-half of the loan for which it was given, is not a surety for the other, so that his property would be only secondarily liable for payment of a judgment against both, where the whole loan was made to him, and the one-half was received by the other in part payment of a debt due from him.—*Fitzgerald v. Nolan*, 288.
3. **Evidence--NOTES--Motive for Delivery**—The motive of the maker of a note in delivering the same is immaterial in an action against the sureties thereon.—*Weis v. Morris Bros.*, 327.

PRIORITY—See EVID. ¹⁸; GEN. ASSIGN ³, ⁴.

PRIVILEGED COMMUNICATION — See EVID. ⁴, ⁴⁶; PRACT. ³⁰; WILLS, ³.

PROBATE LAW—See EVID. ³⁰; GUARDIAN, ¹, ²; PRACT. ¹⁰.

PUBLIC LANDS—See TAXATION, ⁴.

PUBLIC OFFICER—See CRIM. LAW, ⁷, ⁸, ⁹, ¹⁰.

PUBLIC POLICY—See CONTRACTS, ¹⁴.

RAILROADS—See CONTRACTS, ⁴; DAMAGES, ²; EMINENT DOMAIN; EVID. ²⁷; PLEADINGS, ³; SALES, ³, ⁴.

1. **Crossing and Viaduct--CITIES AND TOWNS**—In view of Acts Twenty-second General Assembly, chapter 32, granting to cities of the first class and certain cities of the second class the right to require railway companies to erect viaducts under certain specified conditions and limitations, the words "good, sufficient and safe crossings" in Code, 1873, section 1288, providing that every railway corporation shall construct at all points where its road crosses any public highway, good, sufficient and safe crossings and cattle guards, refer to grade crossings only, and do not cover overhead crossings or viaducts rendered necessary by the establishment of a highway after the construction of a railroad.—*City of Albia v. C. B. & Q. R'y Co.*, 634.
2. **SAME**—An incorporated city or town may lay out and establish streets over a railroad right of way to the same extent as over other private property.—*Idem*.
3. **SAME**—In the absence of express legislation, a railroad company cannot be required to construct crossings over its right of way in order to prolong or connect streets established after the location and acquisition of the right of way.—*Idem*.

RAIL. Continued

4. **Connecting Lines**—Plaintiff shipped lumber to Des Moines over a certain railroad. The cars were delivered to a terminal company, engaged in switching cars, and tendered to defendant company to be hauled to points on defendant's line. Defendant refused to receive the cars, but offered to take the lumber on its cars, stating that the first carrier had forbidden it to use the cars. Plaintiff, in a talk with the original carrier's agent, after the original contract of shipment was made, obtained from him permission for the use of the first carrier's cars by defendant in the shipment of plaintiff's lumber. *Held*, that an order of court, directing the defendant to receive the cars, and the lumber loaded thereon tendered by plaintiff, and transfer it over defendant's railway to stations set forth in the application, and to receive and transport "all such other and further cars, and lumber loaded thereon, as may be loaded with lumber of plaintiff, and under its direction and control that plaintiff may hereafter tender for shipment over defendant's line," was not justified by Code, section 1292, providing that every railroad corporation shall draw over its road the cars of connecting railways.—*Lumber Co. v. C. & P. R'y Co.*, 292.
5. **ESTOPPEL—Mandamus**—The fact that a railway company based its refusal of a shipper's request that it receive the cars of a connecting road for transportation over its line, as required by McClain's Code, section 2089, on the ground that it did not want to do business with such company, does not prevent it from relying upon any legal excuse it had for its refusal, in a proceeding by mandamus, to compel it to receive such cars.—*Idem.*
6. **Contributory Negligence**—Where one having control of a team is driving over a railroad track at a street crossing without looking or listening for trains, or, where there are obstructions rendering looking useless, without stopping to listen, it is contributory negligence.—*Moore v. C., St. P. & K. C. R'y Co.*, 595.
7. **SAME**—Where plaintiff, in approaching a railroad crossing, was guilty of contributory negligence, because, after looking west when about sixty feet from the crossing, he saw no engine approaching, and then looked east, but did not look west again until he was struck by a train, though he could have seen it if he had looked when about forty feet from the crossing, is a question for the jury, where he had no reason to expect a train to approach from the west rather than the east, and had a right to presume that an engine would not be running at a greater speed than that prescribed in an ordinance.—*Idem.*

RAIL. Continued

8. *Evidence*—Evidence that plaintiff injured at a railroad crossing by cars moving over twenty miles an hour knew of the provisions of an ordinance prohibiting trains from moving within the city limits at more than six miles an hour, is admissible on the question of plaintiff's contributory negligence in failing to look for a train from the direction from which the train which injured him came, within sixty feet of the crossing.—*Idem*.
9. *SAME*—Where a helper at a roundhouse knew of the existence of a hole in the turntable and had noticed its location every night that he had worked there up to the time of the accident, and entered no complaint, he assumed the risk of working on such defective turntable, though he may have seen the bridge carpenter measuring it; there being no promise to repair.—*Cowles v. C., R. I. & P. R'y Co.*, 507.
10. *RISK OF EMPLOYMENT—Contributory Negligence*—A railroad employe, who, in the absence of emergency, goes in front of an engine which has almost reached a turntable, knowing that it is still moving with substantially unchecked speed, assumes the risk of so doing, although it was the duty of the hostler in charge of the engine to stop it and wait for a signal before going on the turntable.—*Idem*:
Evidence—See *ante*, ⁸; *post*, ¹⁴, ¹⁶, ¹⁷.
Fires—See *post*, ¹⁴ to ¹⁸.
Jury Question—See *ante*, ⁷; *post*, ¹⁷, ¹⁸.
Mandamus—See *ante*, ⁴, ⁵.
11. *Negligence—PROXIMATENESS—Rules*—The fact that a train is running at a negligent speed will not entitle to recover for the death of a fireman, in the absence of evidence that the death would not have occurred had proper speed been used.—*Cox v. C. & N. W. R'y Co.*, 711.
12. *SAME*—A rule provided for certain speed in passing over switches. It appears that the sole purpose was to guard against collisions within station limits. An engineer caught up a tree lying across the track without knowing it, and carried it on until a switch was reached. There it came in contact with the switch and rails and derailed the engine, killing the fireman. *Held*, the speed at the switch is immaterial, for it appears that carrying the tree was the proximate cause of the accident.—*Idem*.
13. *SAME*—The rules of the company provided that, whenever violent storms prevailed, trackmen should carefully examine the track; that station agents should see that the foreman was on hand with his men to protect the track; and that track foremen should immediately, on the occurrence of such

RAIL. Continued

- storms, take their men and proceed over their sections, and, if any place was found unsafe, flag approaching trains. A storm having blown a limb upon the track, a locomotive picked it up, and carried it into another section where it derailed the train, within about forty minutes after the storm begun. After the train had passed the section where it picked up the limb, but within a little over twenty minutes from the beginning of the storm, the trackmen were out inspecting said section. *Held*, that defendant was not negligent in not causing the section to be examined in advance of the coming of the train—*Idem*.
14. **SETTING FIRE**—The evidence of a witness as to fires other than that in question, but seen near the railway soon after the engine which is claimed to have set the fire in question had passed, and that he went to them at once, but did not see any person or thing which could have caused the fire, except the engine, is admissible.—*Tyler v. C., & N. W. R'y Co.*, 682.
15. **Value of Grass**—In an action against a railroad for damages for negligently destroying grass land by fire, statements of witnesses that the grass land in question was the best in the county, and tending to show the value of the grass in question were admissible, though some of them were based on knowledge of similar pastures instead of actual knowledge of the grass destroyed. Though this testimony was in some respects, objectionable, it was not prejudicial.—*Idem*.
16. **EVIDENCE**—That a fire originated from sparks thrown by a locomotive, may be established by circumstantial evidence.—*Hemmi v. Chicago G. W. R'y Co.*, 25.
17. **PRESUMPTION OF NEGLIGENCE—Jury Question**—Under the rule that proof of damage by fire set by an engine on a railroad is *prima facie* evidence of negligence of the company, where such proof is made, and evidence is introduced to show that there was no fault in the engine or its management, a conflict arises on the issue of negligence, which is to be determined by the jury.—*Idem*.
18. **SAME**—A railroad company cannot be said, as a matter of law, to be free from negligence where a fire is started by sparks from its locomotive, although there was no fault in the engine or its management.—*Idem*.
19. **Rates Made by Railroad Commission—DAMAGES**—A shipper is not concluded, as to the reasonableness of shipping rates, by the schedule of rates adopted by the railroad commissioners under Acts Twenty-second General Assembly, chapter 28, section 17, providing that such schedules shall, in all suits brought

RAIL. . Continued

TO

SALES

against any railroad corporation doing business within the state wherein its charges for transportation of any freight are involved, be deemed, in all courts of the state, as *prima facie* evidence that the rates therein fixed are reasonable and just maximum rates, and the fact that the rates charged by the company do not exceed those fixed by the schedule does not prevent recovery of damages under section 9, as for overcharge.—*Barris & Co. v. C., B. & Q. R'y Co.*, 875.

REBUTTAL—See CRIM. LAW, ²⁶.

RECORDING ACTS—See MORTGAGES, ⁴.

REFORMATION —See Page 789.

RELEASE—MORTGAGES, ⁴, ⁶, ⁷; WAIVER, ¹.

RENT—See CO-TENANCY, ⁷; LAND. AND TENANT.

RENTS AND PROFITS—See CO-TENANCY, ⁸.

REPLEVIN—See JUDGMENTS, ⁶.

1. **Judgment**—PARTIES—In replevin, a judgment for the value of the goods, in favor of a defendant who claimed them under a mortgage, but who did not introduce the mortgage or testify to any interest in the property, was erroneous.—*Jandt v. Pott-hast*, 228.
2. **SAME**—A judgment in replevin should not make any adjudication as to goods of which the plaintiff obtained possession otherwise than under the writ, and before the writ was levied.—*Idem*.
3. **SAME**—A judgment in replevin cannot be entered in favor of several defendants where one of them claimed no interest in the property and did not ask for a judgment for its return or the value thereof.—*Idem*.

RESCISSION—See NEG. INSTR. ¹.

ROBBERY—See CRIM. LAW, ²².

SALES—See BROKERS, ¹, ²; EVID. ¹¹, ¹⁶, ²¹, ⁴⁸, ⁵¹, ⁵², ⁵⁴; FORFEITURE.

1. **Advancement**—INNOCENT PURCHASER—Where, pending partition, one defendant purchases the interest of the others, having notice that plaintiffs were claiming that advancements had been made by the common ancestor of his grantors, he takes the land subject to set-off on account of these advancements.—*Finch v. Garrett*, 381.
2. **Sale of Bailment**—A contract between a manufacturer of goods and another person, giving the latter the privilege of selling goods in a certain territory and requiring him to obtain settlement for all goods at the time of delivery, either in cash or notes to be made payable to the manufacturer, and requiring

Small figures refer to subdivisions of Index. The others to page of report.

ALSO Continued

- him to turn over all cash and notes received by him to such manufacturer, and not permitting him to use any of the proceeds of sales until the manufacturer is paid in full, and authorizing him to sell goods at a reasonable profit and subject to a specified warranty, and in addition, requiring him to guarantee the sales of all goods shipped to him on his order by a time specified therein, and insure the fulfillment of the contract, and requiring him in order to fulfill the contract to advance, at the time of shipment, one-third of the agreed price thereof in cash, and to execute his notes for the balance, and providing for the giving a credit on his account at the end of the season for goods remaining on hand and accepted by the manufacturer, is a contract of sale, and not of bailment, and notes received by him as payee for goods sold by him are subject to levy for his debts, although the manufacturer has not been paid.—*Norwegian Plow Co. v. Clark*, 31.
3. **Delivery by Carrier**—SUBSEQUENT ASSIGNMENT OF BILL OF LADING—Delivery of goods by carrier on order of the consignee, without presentation of bill of lading, to one who has paid the consignee therefor, vests title as against one to whom, after such delivery, the consignee transfers the bill of lading.—*Mill Co. v. B. & N. R'y Co.*, 262.
 4. **SAME**—A carrier, by placing a car of goods on a side track at the point designated as most convenient for unloading, by the person to whom the consignee has sold the goods, and directed the carrier to deliver them without presentation of the bill of lading, and by notifying such person thereof, makes a sufficient delivery to him of the goods as against one to whom the consignee thereafter transfers the bill of lading.—*Idem*.
 5. **Evidence**—VALUE—Evidence of the value of the land at the time of the trial is inadmissible, in the absence of evidence that the value had not changed since the time of the transactions in regard thereto, for which suit is brought.—*Goin v. Hess*, 140.
 6. **Land Sale Commissions**—One employed to sell land at an agreed price, and receive in part payment land of a certain character within a specified locality, cannot recover commissions where the owner refuses to consummate the trade, if the contract of employment provided that the sale should be subject to the owner's approval.—*Idem*.
 7. **OTHER AGENTS**—Evidence that a third person was authorized to act for defendant in effecting a sale of land is admissible in an action against him for commissions in procuring the sale, where there is evidence that such third person had done some of the work in connection with the sale,—and not otherwise.—*Idem*.

SALES Continued TO SPECIFIC PERFORM.

8. SAME—Evidence as to the quality and value of defendant's farm is inadmissible in an action for commissions in finding a purchaser for the land, at a specified price per acre fixed by defendant.—*Idem*.
9. Quitclaim Deed—FAILURE OF TITLE—One who doth "grant, bargain and sell, and quitclaim" land by a deed containing no covenant nor warranty of title is not liable thereunder for defect or failure of title.—*Nelson v. Hamilton County*, 229.
10. Warranty—ACTION FOR PRICE—Plaintiff advised defendant, a farmer, who wished a wind-mill, to buy one made by a third party, and gave him a circular, issued by such third party, guaranteeing that it would not wreck in any storm that did not destroy the building. Defendant thereafter agreed to buy a wind-mill of that kind. When plaintiff began to set it up on defendant's farm, he gave him a circular, issued by the maker, requiring certain questions to be answered by a purchaser before a signed guaranty of the wind-mill would be issued. These questions defendant refused to answer, and also refused to accept the mill, or pay for it, unless guaranteed as stated in the first circular. *Held*, that an action for the price would not be sustained.—*Becker et al. v. Calderwood*, 529.
11. SAME—Plaintiffs sold machinery as their own by contract, providing that the purchaser should have the maker's guaranty, and on delivering it gave the purchaser a letter from the maker accompanying it, and told him, "there is a letter with the questions you will have to answer before you can get a warranty." *Held*, that this was an attempt by plaintiff to impose on the contract new conditions, which, it will be assumed, were the only terms on which they could give the maker's guaranty.—*Idem*.

SCHOOL DISTRICTS—See TAXATION, 1.

SEARCH WARRANTS— See JUDGMENTS, 1.

Under the Code, the filing of an information accusing some person of larceny, is not a condition precedent to the issuing of a search warrant on the ground of an alleged theft of property.—*Haworth v. Newell*, 541.

SEDUCTION—See BREACH OF PROMISE, 1, 2.

SETTING FIRE—See DAMAGES, 1, 2, 10; EVID. 68; RAIL. 14 to 18.

SETTLEMENT—See EVID. 62.

SHERIFFS—See COUNTIES, 1, 2, 3.

SPECIFIC PERFORMANCE.

TENDER—A purchaser under a land contract is not bound to tender the balance of the purchase money before bringing the

Small figures refer to subdivisions of Index. The others to page of report.

STAT.

TO

TAX.

suit for specific performance, where the vendor has conveyed the land to a third person — *Auxier v. Taylor*, 673.

STATUTE.

TAKING EFFECT OF—Acts Seventeenth General Assembly, chapter 132, authorizing any school districts against which judgments have been rendered “prior to the passage of this act,” to issue bonds in payment thereof, includes judgments rendered between the approval of the act and the time it took effect. — *Thompson v. District of Allison*, 94.

STATUTORY FRAUDS—See **CONTRACTS** ¹¹, ¹⁷; **EVID.** ⁴⁴, ⁴⁵, ⁴⁶.

STOCKHOLDERS—See **BANKS**; **ESTATES**, ¹⁰, ¹¹.

STOCKHOLDER'S LIABILITY.

1. **Judgment Against Corporation**—*Practice*—The rendition of a judgment against a corporation is not a necessary prerequisite to the maintenance of an action to enforce the statutory liability of the stockholders for the corporate debt, where the corporation is notoriously insolvent, its assets have been seized under legal process, and it has ceased to do business.—*Latimer et al. v. State Bank*, 162.

2. **Conflict of Laws**—The individual liability of stockholders under Compiled Laws of South Dakota, section 2933, providing that every stockholder shall be liable to a joint or several action for the corporation's debts to the amount unpaid on his stock, may be enforced in another state, since the Dakota statute neither provides a special remedy nor creates an exclusive statutory liability.—*Idem*.

SUB-CONTRACTOR—See **CONTRACTS**, ³.

SURETIES—See **MULCT LAW**, ¹; **PLEA AND PROOF**, ²; **PRACT. SUP. CT.** ²⁰; **PRIN. AND SURETY**, ², ³.

TAXATION.

1. **Appeal**—Under the statute authorizing such court to determine as an original question the amount to be assessed, the district court, on appeal from the action of the board of equalization in raising an assessment, should, on finding that the property should not have been assessed more than the original valuation, reduce the assessment to such amount, although it finds the board acted honestly and fairly in making the increase.—*Lyon v. Board of Equalization of Ottumwa*, 1.

2. **Mulot Tax**—**SCHOOL DISTRICTS**—*Municipalities*—A school district township is not a “municipality,” within the laws of 1894, chapter 63, section 14, which provides that one-half the tax levied and collected on saloons, under the act, shall be paid

Small figures refer to subdivisions of Index. The others to page of report.

TAX. Continued TO WAIVER

over by the county treasurer to the municipality in which the business is conducted.—Township of Sheridan v. Frahm, 5.

3. SAME—Whether an ordinary tax may be collected by an ordinary action, is left undecided.—Marshall County v. Knoll, 578.

4. Public Lands—PATENT—A pre-emption claim was cancelled, and the land certified to the state, which patented it to a railroad company. The pre-emption claimant, however, refused to receive back the payments which had been made by him, and insisted on the validity of his claim; and subsequently the certification was cancelled, and a patent issued to him. *Held*, that the United States did not hold the title in trust after the certification, and the land became taxable from that time.—Iowa R. R. Land Co. v. Davis, 128.

5. Voluntary Payment—MISTAKE OF LAW—Where the railway company, after the annulment of the certification and the issuance of the patent to the claimant, and after decisions of the general land office of the United States supreme court against the contention on which it based its claim, paid taxes on the land, long before they became delinquent, and without the claimant's consent, it can not recover the amount paid from the claimant.—*Idem*.

TAX DEED—See CO-TENANCY, 2, 3, 4.

TAXES—See MULCT LAW, 2.

TELEGRAPH COMPANIES—See DAMAGES, 7, 8, 12, 13; EVID. 14.

TENDER—See SPECIFIC PERFORMANCE.

TREATIES—See ESTATES, 4, 5, 6, 7, 8.

TRESPASS.

"WILFUL" DEFINED—The term "wilful" in Code, section 3983, making it an offense to wilfully commit a trespass by cutting down timber on another's land or carrying the same away, does not necessarily involve an intent to injure the owner, of the land, but it is sufficient if the accused knew that the act was a violation of the owner's rights, or was careless as to whether it was or not.—Parker v. Parker, 500.

TRUSTS—See GEN. ASSIGN. 3, 4; MORTGAGES, 4, 5; WILLS, 5, 6, 7.

UNDUE INFLUENCE—See page 137; EVID. 57.

UTTERING—See CRIM. LAW, 27.

VENDORS LIEN—See EVID. 54.

VERDICT—See PRACT. SUP. CT. 57.

WAIVER—See CONTRACTS, 18; EVID. 22; GARNISHMENT, 2; INSUR. 14, 20; PLEADINGS, 7; PRACT. SUP. CT. 29.

1. Agreement to Keep Property Insured—WAIVER BY ASSIGNMENT OF POLICY—At a sale of a lot, the owner took a purchase money mortgage, providing that the purchaser should

WAIVER Continued

TO

WILLS

keep the building insured for the benefit of the mortgagee. The vendor assigned to the vendee a policy of insurance. *Held*, that the assignment of the policy was made to preserve the insurance, and the obligation of mortgagor to keep the property insured was not waived by such assignment.—*Heins v. Wicke*, 396.

2. BY ASSIGNING POLICY TO MORTGAGOR—The assignment of a policy of insurance by the grantor to the grantee of the insured property does not operate to release the equitable lien of the former upon the policy or its proceeds, under a covenant of a purchase money mortgage that the mortgagor will keep the property insured for his benefit.—*Idem*.
3. BY PERMITTING SUIT ON POLICY—A mortgagee is not estopped to claim the proceeds of an insurance policy taken out by the mortgagor for his benefit, because he permitted the assignee of the policy to sue thereon, where he intervened in such suit, and the intervention was dismissed at the request of the assignee.—*Idem*.
4. ESTOPPEL BY ASSIGNMENT OF POLICY.—The assignment of a policy of insurance by the grantor to the grantee of the insured property does not estop the former to assert his equitable lien to the proceeds of the policy, under a covenant in a purchase money mortgage that the mortgagor will keep the property insured for his benefit, against the assignee of the policy after a loss who had actual notice of the mortgage and covenant and of the mortgagee's claim thereunder.—*Idem*.

WARRANTY—See SALES, ¹⁰, ¹¹.

CONTRACTS—*Practice*—Defendant cannot defeat an action for goods sold and labor performed in roofing a house under an understanding that the labor and material should be paid for, at least in part, by proof of a breach of warranty by the plaintiff in respect to the old roofing; but his remedy is confined to a claim for damages for the breach —*Wadleigh v. McDowell & Co.*, 480.

WIDOW—See ESTATES, ¹².

WILLS—See EVID. ¹⁴.

1. ALLEN—DEVISE—A non-resident alien may take by devise under Acts Twenty-second General Assembly, chapter 85, section 1, prohibiting a non-resident from acquiring title to, or taking any lands by devise or otherwise, except as afterwards provided, and section 2, authorizing non-resident aliens to acquire and hold three hundred and twenty acres of land, if within five

Small figures refer to subdivisions of Index. The others to page of report.

WILLS Continued

years from the date of purchase the same is placed in the actual possession of a relative within the third degree, and such relative becomes a naturalized citizen within ten years from the purchase. — *Furenes v. Severtson*, 822.

2. **Construction of**—The will gave the wife a share of the net income of the entire estate, to be paid in monthly installments, and provided that such share of the income should be added to, if needed, to make a stated sum. It gave the residue of the estate to named children with the provision that the executor should hold it until the wife died, and if she died before the youngest child became of age, until such child attained its majority, at which time the executor should divide the estate remaining, equally between "the children then living." *Held*:

- a. The estate did not vest in the children at testator's death, hence the representatives of one of the children who died during the life of the widow and before the youngest child became of age, took no interest in said estate.
- b. The rule that where there is an absolute devise to a specified person, subsequent limitations are void for repugnancy, has no application.
- c. Said representatives can take nothing under a provision that if any surplus remains after paying debts and other directed expenditures, the executor, at the end of the year, shall pay each child such share as such surplus shall warrant. — *Wilhelm v. Calder*, 843.

3. **Contests**—**PRIVILEGED COMMUNICATION**—*Attending Physician*—On probate of a will, the contesting heir at law, as well as the devisee or the executor, may examine the testator's attending physician in respect to information acquired in his professional capacity, though Code, section 3643, prohibits the disclosure of such information unless the party for whose benefit the prohibition is made waives his rights thereunder. It would, however, remain discretionary to exclude such testimony if it tended to blacken the memory of the dead. — *Winters v. Winters*, 53.

4. **"My Heirs" Construed**—*Alienage*—A devise of half of the estate of a childless testator to his heirs and the other half to the heirs of his wife, passes the title to half such remainder to the collateral heirs of testator, although they are all non-resident aliens, and the heirs of the wife are citizens, under Acts Twenty-second General Assembly, chapter 85, section 2, authorizing any non-resident alien to acquire and hold real property under specified conditions. The words "my heirs"

are here used as a description and not to denote succession. It was not the intent of testator to exclude such of his "heirs" as were unable to take by descent, on account of alienage.—*Furenes v. Severtson*, 322.

5. **Trusts**—A executor held the property in trust under the will for certain persons, and was given the custody and full control and management thereof, and ample authority, without order of court, to lease and sell and convey or otherwise control the same in his own name as executor, having as full right and authority to manage it and its proceeds as though he were unmarried, and had acquired absolute title by purchase. *Held*, that no property rights were thereby conferred on the executor, and that he could sell only, in good faith, in the execution of the trust.—*Sneers v. Stutz*, 462.
6. **EXEMPTIONS FROM GIVING BOND**—Where a will provided that the executor who was also trustee under the will, could act without giving bond, and was silent as to whether grand children of testatrix should give bond on assuming the trust on the executor's death, a bond would be required of them, under McClain's Code, section 3550, providing that trustees appointed by will or by court must give bond the same as executors.—*Idem*.
7. **SAME**—Testamentary trustees who are expressly authorized to sell real property in their discretion without authority from or approval of the court, may exercise such power for the purpose of raising money to pay taxes and expenses in the care and management of the trust property.—*Idem*.
8. **Widow—ACCEPTANCE OF DEVISE**—A devise to a wife by her husband of a life estate, without an express provision that such estate shall be in lieu of dower, does not bar her of her distributive share of his estate, though she accepts the devise.—*Sutherland v Sutherland*, 535.

AUTHORITIES CITED

IN THE OPINIONS REPORTED IN THIS VOLUME.

A

Abbott, Law Dict. tit. "Public Officer"	648
1 Am. & Eng. Enc. Law, 430.....	200
1 Am. & Eng. Enc. Law (2d ed.) 641.....	563
1 Am. & Eng. Enc. Law (2d ed) 796.....	157
2 Am. & Eng. Enc. Law, tit. "Aggravation of Damages".....	586
3 Am. & Eng. Enc. Law, 840.....	37
5 Am. & Eng. Enc. Law, 36.....	290
7 Am. & Eng. Enc. Law, 661.....	419
17 Am. & Eng. Enc. Law, 254.....	601
19 Am. & Eng. Enc. Law, 882....	643
19 Am. & Eng. Enc. Law, 887, 888.....	650
25 Am. & Eng. Enc. Law 312.....	577
Anson, Contract, 63.....	705
Anderson's Law Dictionary, tit. "Commodity"....	608
Angell & A., Corporations, sec. 327.....	305

B

Beach, Corporation, sec. 31.....	305
Beach, Private Corporations, sec. 295	515
Beach, Private Corporations, sec. 323	306
1 Beach, Insurance, sec. 566	560
Benjamin, Sales (6th ed) p 5, 7	36, 37
Bishop, Non. Contracts, 617.....	711
Bishop, Criminal Law, secs. 361, et seq	203
Black's Law Dictionary, tit. "Office".....	643
2 Blackstone's Commentaries, p. 36	643
Boone, Corporations, sec. 56	306
Brown, Bailment, p. 3	36
Browne, Parol Evidence, p 289.....	385
Bouvier's Law Dictionary, tit. "Adjust".....	563
Bouvier's Law Dictionary, tit. "Office".....	643
Burrill's Law Dictionary, tit. "Office".....	642

C

Caruther's History of a Law Suit, p. 478.....	645
Century Dictionary, tit. "Office".....	642
Clark, Contracts, 471.....	99

Cobbey, Replevin, sec. 1142.....	228
Cochran's Law Lexicon, tit. 'Office'.....	642
Cook, Stock, Stockholders, & Corporation Law, secs. 192, 212, 213.....	166
Cook, Stock, Stockholders, & Corporation Law, sec. 200.....	167
Cooley, Constitutional Limitations, p. 86.....	213
Cooley, Constitutional Limitations (6 ed.) pp. 476-478, et seq....	213
Cooley, Torts (2 ed.) p. 143.....	611
Cooley, Taxation, 435, 15.....	577
D	
Daniel, Negotiable Instruments (4 ed.) sec. 62a.....	231
2 Devlin, Deeds, secs. 829, 830.....	384
Dillon, Municipal Corporations, sec. 89.....	77
Dillon, Municipal Corporations (4 ed.) secs. 300, 301.....	515, 520
Dillon, Municipal Corporations, sec. 1020.....	426
2 Dillon, Municipal Corporations, sec. 653.....	577
Drake, Attachments, sec. 511.....	566
E	
3 Elliott, Roads & Streets, sec. 1239.....	290
F	
Freeman, Co-Tenancy, sec. 509.....	158
1 Freeman, Judgments, sec. 258.....	
G	
Greenleaf, Evidence, sec. 192.....	308
1 Greenleaf, Evidence, secs. 109, 189.....	336
1 Greenleaf, Evidence, sec. 164.....	665
1 Greenleaf, Evidence, secs. 275, 281.....	354
2 Greenleaf, Evidence, 453.....	504
3 Greenleaf, Evidence, sec. 21.....	416
H	
Hageman, Privileged Communications, sec. 84.....	57
Hale, Damages, 357.....	238
High, Extraordinary Remedies, sec. 625.....	643
Horton, Insurance, sec. 1090.....	308
Hutchinson, Carriers, sec. 340.....	265
Hutchinson, Carriers, sec. 480.....	266
J	
2 Jarman, Wills (6 Am. ed.) 905, et seq.....	325
Jones, Chattel Mortgages, sec. 60.....	123
Jones, Mortgages, sec. 957.....	487
1 Jones, Mortgages, secs. 400, 402, 403.....	410
1 Jones, Real Property, secs. 295, 301.....	385
2 Jones, Real Property, sec. 1887, et seq.....	159
2 Jones, Real Property, sec. 1892.....	159
2 Jones, Real Property, sec. 1893, et seq.....	158

AUTHORITIES CITED.

833

K

Keener, Quasi-Contracts, p. 23.....	91
8 Kent, Commentaries, 454.....	643

M

May, Insurance, sec. 483.....	116
May, Insurance, 506.....	309
1 McClain, Criminal Law, secs. 112, 128.....	203
1 McClain, Criminal Law, sec. 646.....	646
Mechem, Agency, sec. 372.....	149
Mechem, Public Officers, sec. 1.....	643
Mechem, Public Officers, secs. 8, 88.....	650
Mechem, Public Officers, secs. 579, 661, 677.....	417

N

Newell, Malicious Prosecution, 247.....	504
Niblack, Ben. Soc. & Acc. Ins. (1 ed) sec. 16.....	306

P

1 Parsons, Contracts, 451.....	704
2 Parsons, Contracts, 21.....	704
Perry, Trusts, sec. 554.....	
Phillips, Mechanics' Liens, sec. 78.....	214
2 Pomeroy, Equity Jurisprudence, sec. 859.....	354

R

Rawle, Covenants, sec. 370.....	232
Rood, Garnishments, secs. 5, 193.....	257
Rood, Garnishments, sec. 271.....	259

S

Schouler, Wills, secs. 470, 533, 542.....	325
1 Sedgwick, Damages, 122.....	220
Shearman & R. Negligence, 99.....	513
Shinn, Attachments, sec. 467.....	257
Standard Dictionary, tit. "Casualty" and "Misfortune".....	522
Sutherland, Damages, sec. 412.....	430
2 Sutherland, Damages, p. 232.....	92
2 Sutherland, Damages, sec. 535.....	91
3 Sutherland, Damages, sec. 961.....	220
8 Sutherland, Damages, 969.....	223
Sutherland, Statutory Construction, secs. 107, 160.....	98
Sutherland, Statutory Construction, secs. 208, 371.....	416

T

Thompson, Negligence, sec. 1265.....	430
Throop, Public Officers, secs. 2, 10.....	644
Throop, Public Officers, secs. 566, 726.....	417
Tiedeman, Limitations, pp. 366, 367, et seq.....	213

V

1 Van Fleet, Former Adjudication, 31.....	570
---	-----

W

2 Warvelle, Vendors, p. 949, sec. 8.....	92
1 Washburn, Real Property, 90.....	172
Webster's Dictionary, tit. "Office".....	643
Webster's Dictionary, tit. "Adjust".....	563
Wells, Replevin, sec. 491.....	228
1 Wharton, Criminal Law, sec. 88.....	416
2 Woerner, Administration, secs. 1214, 1217, 1218, 1219.....	87
2 Wood, Insurance, secs. 243, 245, 260.....	482
2 Wood, Insurance, sec. 460.....	115

CASES CITED

IN OPINIONS REPORTED IN THIS VOLUME.

A

Adams v. Insurance Co.	70 Cal. 198; 11 Pac. Rep. 627.	620
Ahern v. Freeman.	48 N. W. Rep. (Minn.) 677.	490
Allen v. Evans.	37 N. E. Rep. (Mass.) 571.	214
Allen v. Pegram.	16 Iowa, 163.	232
Allen v. Public Administrator.	1 Bradford Sur. 221.	58
Allgeyer v. State of Louisiana.	17 Sup. Ct. Rep. 427.	67
American Emigrant Co. v. Iowa R. R. Land Co.	53 Iowa, 323; 3 N. W. Rep 88	182, 135
American Trust & Savings Bank v. Guelder & Paeschke Mfg. Co.	87 N. E. Rep. (Ind. Sup.) 227.	201
Ames v. Richardson.	29 Minn. 330; 13 N. W. Rep. 137.	409
Anderson v. Haskell.	45 Iowa, 45.	98
Anderson v. Insurance Co.	88 Iowa, 594; 55 N. W. Rep. 348.	38
Andrews v. Burdick.	62 Iowa, 714; 16 N. W. Rep. 275.	431
Archer v. Railroad Co.	65 Iowa, 611; 22 N. W. Rep. 894.	117
Arthur v. Funk.	22 Iowa, 238.	22
Arthur v. Insurance Co.	78 N. Y. 462.	116
Ashcraft v. De Armond.	44 Iowa, 229.	860
Association v. Norris.	8 Atl. Rep. (Pa. Sup.) 638.	116
Athearn v. Independent Dist.	33 Iowa, 105.	515
Atkins v. Anderson.	63 Iowa, 739; 19 N. W. Rep. 323.	114
Attorney General v. Barstow.	4 Wis. 587.	643
Aulman v. Aulman.	71 Iowa, 124; 32 N. W. Rep. 240.	730
Aultman & Co. v. Goldsmith.	84 Iowa, 547; 51 N. W. Rep. 43.	895
Austin v. Barrett.	44 Iowa, 488.	158, 159, 160
Austin v. Thorp.	30 Iowa, 876.	149
Auter v. Miller.	18 Iowa, 405.	365
Ayers, Weatherwax & Reed Co. v. Dorsey Produce Co.	101 Iowa, 141; 70 N. W. Rep. 111.	266

B

Babcock v. Railroad Co.	62 Iowa, 598; 13 N. W. Rep. 740.	29
Bailey v. Bailey.	94 Iowa, 598; 63 N. W. Rep. 341.	196
Baker v. McLeod's Estate.	48 N. W. Rep (Wis.) 657.	346
Ball v. Railway Co.	74 Iowa 132; 37 N. W. Rep. 110.	56
Bank v. Anderson.	14 Iowa, 544.	489
Bank v. Ash.	85 Iowa, 74; 51 N. W. Rep. 1160.	746
Bank v. Clements.	87 Iowa, 542; 54 N. W. Rep. 197.	417
Bank v. Crittenden.	66 Iowa, 237; 23 N. W. Rep. 646.	780
Bank v. Dandridge.	12 Wheaton, 69.	515
Bank v. Franklyn.	120 U. S. 747; 7 Sup. Ct. Rep. 757.	165
Bank v. Rindge.	27 N. E. Rep. (Mass.) 1015.	165
Bank v. Shoemaker.	11 Atl. Rep. 304 (Pa. Sup.).	126

Bank v. Sigstad	96 Iowa, 491; 65 N. W. Rep. 407.	817
Barnhart v. Farr	55 Iowa, 366; 7 N. W. Rep. 644.	332
Barr v. Patrick	59 Iowa, 134; 12 N. W. Rep. 905.	133
Bartle v. City of Des Moines	39 Iowa, 414	371
Bartlett v. Insurance Co	77 Iowa, 155; 41 N. W. Rep. 601.	564
Baston v. Clifford	68 Ill. 87	93
Battle v. Bank	5 Barb. 414	93
Bayliss v. Davis	47 Iowa, 340	40
Beals v. Insurance Co	86 N. Y. 523	518
Beavan v. Went	41 N. E. Rep. (Ill. Sup.) 91	180
Becker v. Keokuk W. W. Co	79 Iowa, 419; 44 N. W. Rep. 694.	77
Belden v. State	108 N. Y. 1; 8 N. E. Rep. 363.	570
Belknap v. Belknap	77 Iowa, 71; 41 N. W. Rep. 568.	159
Benbow v. Soothsmith	76 Iowa, 151; 40 N. W. Rep. 693.	704
Bener v. Edgington	76 Iowa, 105; 40 N. W. Rep. 117.	571
Bennett v. Beam	4 N. W. Rep. (Mich.) 8	585
Bennett v. Bevard	6 Iowa, 83	96
Bennett v. Hibbert	88 Iowa, 154; 55 N. W. Rep. 93	171, 324
Benson v. Lundy	52 Iowa, 265; 3 N. W. Rep. 149.	571
Bentley v. Snyder	101 Iowa, 1; 69 N. W. Rep. 1023.	37
Beroud v. Lyons	85 Iowa, 432; 52 N. W. Rep. 436.	328
Bertram v. Curtis	31 Iowa, 46	16
Berry v. Insurance Co	132 N. Y. 49; 30 N. E. Rep. 254.	559
Beyer v. Thoeming	81 Iowa, 517; 46 N. W. Rep. 1074.	563
Bills v. Bills	80 Iowa, 269; 45 N. W. Rep. 748.	347
Bingham v. Miller	17 Ohio, 445	213
Bird v. Thompson	9 S. W. Rep. (Mo. Sup.) 788.	586
Bixby v. Carskaddon	70 Iowa, 726; 29 N. W. Rep. 626.	571
Blackburn v. Crawford	8 Wallace, 175.	57
Blake v. Blake	7 Iowa, 46	704
Blake v. Rourke	74 Iowa, 519; 38 N. W. Rep. 392.	360
Bliven v. City of Sioux City	85 Iowa, 346; 53 N. W. Rep. 246.	104
Bodel v. Nehls	85 Iowa, 164; 53 N. W. Rep. 123.	210
Bolles v. Creighton	73 Iowa, 199; 34 N. W. Rep. 815.	730
Bond v. Com	83 Va. 531; 3 S. E. Rep. 149	700
Bosch v. Kassing	64 Iowa, 312; 20 N. W. Rep. 454.	403
Boyd v. Boyd	L. R. 4, Eq. 305	86
Boyd v. Watson	101 Iowa, 214; 70 N. W. Rep. 120.	333
Boyer v. Austin	54 Iowa, 402; 6 N. W. Rep. 585.	114
Boyer v. Hawkins	86 Iowa, 40; 52 N. W. Rep. 659.	259
Bradford v. Justices, Etc.	33 Ga. 336	645, 647
Bradley v. Cole	67 Iowa, 650; 25 N. W. Rep. 849.	135
Brady v. Burke	90 Cal. 1; 27 Pac. Rep. 52	436
Brockman v. City of Creston	79 Iowa, 587; 44 N. W. Rep. 822	77, 78
Brooks v. Railway Co.	73 Iowa, 179; 34 N. W. Rep. 807.	289
Brooks v. State	51 Ga. 612	700
Brown v. Insurance Co	74 Iowa, 428; 38 N. W. Rep. 135.	560
Brown v. Russell	43 N. E. Rep. (Mass.) 1005.	644, 647
Bruce v. Slemp	4 S. E. Rep. (Va.) 692	384
Bruner v. Bank	34 L. R. A. (Tenn. Sup.) 532; 37 S. W. Rep. 286	205
Bryan v. Malloy	90 N. C. 508	437
Budlong v. Cottrell	64 Iowa, 234; 20 N. W. Rep. 166.	40
Buell v. Buckingham	16 Iowa, 284	729
Buena Vista County v. Iowa Falls & S. C. R. Co.	49 Iowa, 657	240
Buena Vista County v. Iowa Falls & S. C. R. Co.	55 Iowa, 157; 7 N. W. Rep. 474.	281

Buena Vista County v. Iowa	
Falls & S. C. R. Co.	112 U. S. 165; 5 Sup. Ct. Rep. 84.. 132
Buhlman v. Humphrey	86 Iowa, 597; 53 N. W. Rep. 318. 109
Bunn v. People	45 Ill. 397..... 645
Bunyan v. Loftus	90 Iowa, 122; 57 N. W. Rep. 685
55, 495
Burden v. Knight	83 Iowa, 584; 48 N. W. Rep. 985. 365
Burge v. Railroad Co	33 Iowa, 101..... 92
Burns v. Byrne	45 Iowa, 287..... 157
Burns v. Railroad Co	69 Iowa, 450; 30 N. W. Rep. 25.. 510
Burrow v. Burrow	98 Iowa, 400; 67 N. W. Rep. 287.. 171
Burrows v. Lehndorff	8 Iowa, 96..... 739
Burton v. Baldwin	61 Iowa, 288; 16 N. W. Rep. 110.. 56
Byam v. Cook	21 Iowa, 392..... 408

C

Campbell v. Hall	16 N. Y. 575..... 436
Carlton v. People	150 Ill. 181; 37 N. W. Rep. 244
698, 700
Carpenter v. Brown	50 Iowa, 451..... 494
Carroll v. Insurance Co	73 Cal. 297; 18 Pac. Rep. 863 620
Carter v. Bank	36 Am. Rep. 341..... 490
Carter v. Insurance Co	12 Iowa, 287..... 115
Carter v. Steyer	98 Iowa, 533; 61 N. W. Rep. 966.. 108
Carver v. Coffman	109 Ind. 547; 10 N. E. Rep. 567.... 158
Center v. Spring	2 Iowa, 393..... 504
Chamberlain v. Ingalls	38 Iowa, 300..... 704
Chandler v. Pettit	19 Am. Dec. 399..... 126
Chapin v. Garretson	85 Iowa, 377; 53 N. W. Rep. 104.. 311
Chapman v. Insurance Co	89 Wis 572; 63 N. W. Rep. 423.. 620
Charless v. Lamberson	1 Iowa, 435..... 97
Chicago, B. & Q. R. Co v People	77 Ill. 443..... 379
Chicago, & N. W. R'y Co. v. City of Chicago	140 Ill. 309; 29 N. E. Rep. 1109.... 630
Chicago, R. & M. R. Co. v. Carroll County	41 Iowa, 153..... 132
Chicago, M. & St. P. R. Co. v Starkweather	97 Iowa, 159; 66 N. W. Rep. 87.. 626
Chickering v. Bastress	130 Ill. 206; 22 N. E. Rep. 542
36, 40
Childs v. Shower	18 Iowa, 261..... 213
Chippewa Lumber Co. v. Phoenix Ins. Co.	80 Mich. 116; 44 N. W. Rep. 1055 620
Chirac v. Chirac	2 Wheaton, 259..... 172
Citizens State Bank v. Council Bluffs Fuel Co	89 Iowa, 618; 57 N. W. Rep. 444. 257
City of Burlington v. Burlington & M. R. Co	41 Iowa, 184..... 580
City of Chicago v. Kelly	69 Ill. 475..... 426
City of Council Bluffs v. Stewart	51 Iowa, 385; 1 N. W. Rep. 628.. 98
City of Davenport v. Mitchell	15 Iowa, 194..... 126, 621
City of Dubuque v. Ill. Cent. R'y Co	39 Iowa, 56..... 577, 580
City of Sioux City v. Weare	59 Iowa, 95; 12 N. W. Rep. 786.. 79
Clapp v. Association	146 Mass. 519; 16 N. E. Rep. 433. 415
Clark v. City Des Moines	19 Iowa, 199..... 77
Clark v. Ralls	50 Iowa, 275..... 317
Clark v. Raymond	86 Iowa, 661; 53 N. W. Rep. 354. 257
Clark v. Riddle	101 Iowa, 270; 70 N. W. Rep. 207 733
Cohn v. Neeves	40 Wis. 393..... 415

Coles v. Shepard.....	16 N. W. Rep. (Minn.) 153.....	675
Collingwood v. Pace.....	1 Vent. 418.....	180
Collins v. Phillips.....	91 Iowa, 210; 59 N. W. Rep. 40..	325
Commonwealth v. Evans.....	74 Pa. St. 124.....	644, 647
Commonwealth v. Kneeland....	20 Pickens, 206.....	506
Commonwealth v. Raymond....	97 Mass. 568.....	416
Commonwealth v. Weiss.....	139 Pa. St. 247; 21 Atl. Rep. 10..	416
Conable v. Lynch.....	45 Iowa, 84.....	40
Conyngham v. Smith.....	16 Iowa, 471.....	212
Cook v. Railroad Co.....	37 Iowa, 426.....	371
Cooper v. Chambers.....	25 Am. Dec. 710.....	704
Cornog v. Fuller.....	30 Iowa, 212.....	489
Corson v. Coal Co.....	101 Iowa, 224; 70 N. W. Rep. 185.	708
Corwin v. Railway Co.....	33 Pac. Rep. (Kan. Sup.) 99.....	12
Cowles v. Ricketts.....	1 Iowa, 582.....	729
Cox v. Russell.....	44 Iowa, 556.....	566
Craig v. Fowler.....	59 Iowa, 200; 18 N. W. Rep. 116.	570
Cramer v. Proprietary Co.....	12 Me 354.....	515
Cramer v. City of Burlington...	39 Iowa, 512.....	104
Crawford v. Bergen.....	91 Iowa, 675; 60 N. W. Rep. 205.	217
Cromwell v. County of Sac.....	94 U. S. 351.....	570
Crumes v. State.....	18 S. W. Rep. (Tex. App.) 868...	696
Cummings v. Long.....	16 Iowa, 41.....	568
Curtis v. Millard.....	14 Iowa, 128.....	430

D

Daggett v. Wallace.....	13 S. W. Rep. (Tex. App.) 49....	586
Daugherty v. Daugherty.....	69 Iowa, 677; 29 N. W. Rep. 778..	537
Davenport v. Davenport & S. P. R'y Co.....	37 Iowa, 624.....	98
Davidson v. Society.....	39 Minn. 303; 39 N. W. Rep. 803.	306
Davis v. City of Clinton.....	55 Iowa, 549; 8 N. W. Rep. 423..	3, 4
Davis v. Hall.....	52 Md. 678.....	92
Day v. Caton.....	119 Mass. 513.....	210
Dayton v. Tillotson.....	39 Iowa, 404.....	440
Deere v. Weir, Shugart Co.....	91 Iowa, 422; 59 N. W. Rep. 255.	19
Denning v. Butcher.....	91 Iowa, 425; 59 N. W. Rep. 69, 57,	360
Detroit v. Detroit & H. P. R. Co..	48 Mich. 140; 5 N. W. Rep. 275..	630
Devecmon v. Shaw.....	14 Atl. Rep. 464 (Md.).....	705
Devin v. Himer.....	29 Iowa, 297.....	703
Devine v. Insurance Co.....	32 Wis. 471.....	303
Dewey v. Life.....	60 Iowa, 361; 14 N. W. Rep. 347..	365
Dickerson v. Yetzer.....	53 Iowa, 681; 6 N. W. Rep. 41....	132
Dirkson v. Knox.....	71 Iowa, 728; 30 N. W. Rep. 49..	354
District Township v. Morton....	37 Iowa, 550.....	417
District Township v. Smith....	39 Iowa, 9.....	417
Dittenhoefer v. Clothing Co....	30 Pac. Rep. (Wash) 660.....	259
Dively v. City of Cedar Falls....	21 Iowa, 565.....	78
Dively v. City of Cedar Falls....	27 Iowa, 227.....	98
Doane v. Insurance Co.....	45 N. J. Eq. 274; 17 Atl. Rep. 625	306
Dodge v. Davis.....	85 Iowa, 77; 52 N. W. Rep. 2....	159
Doe v. Land Co.....	54 Iowa, 657; 7 N. W. Rep. 113..	132
Doherty v. O'Callaghan.....	157 Mass. 90; 81 N. E. Rep. 726..	57
Donovan v. Railway Co.....	158 Mass. 450; 33 N. E. Rep. 583..	636
Doon District Township v. Cummins.....	12 Sup. Ct Rep. 320.....	74
Doulin v. City of Clinton.....	33 Iowa, 397.....	104
Drake v. Fulliam.....	98 Iowa, 339; 67 N. W. Rep. 225.	495
Dubuque & S. C. R. Co. v. Board of Supervisors.....	40 Iowa, 16.....	133

Duncan v. Duncan	63 Iowa, 150; 18 N. W. Rep. 858.	389
Ducker v. Burnham	146 Ill. 9; 34 N. E. Rep. 558.....	346
Dwight v. Railroad Co.....	182 N. Y. 199; 30 N. E. Rep..	898, 290

E

Edler v. Hasche	67 Wis. 653; 31 N. W. Rep. 57. .	259
Edmunsen v. School District ..	98 Iowa, 639; 67 N. W. Rep. 671.	96
Eliason v. Coleman	86 N. C. 241.....	644, 647
Ellis v. Butler	78 Iowa, 632; 43 N. W. Rep. 459.	240
Evans v. Jayne	23 Pa. St. 34.....	213

F

Fairfield v McNany.....	37 Iowa, 75.....	570
Fanning v. Railroad Co	37 Iowa, 379.....	257
Farnum v. Insurance Co	83 Cal 246; 23 Pac Rep. 869.....	559
Ferguson v. Railway Co.....	100 Iowa, 733; 69 N. W. Rep. 1026	512
Field v. Schiefflin.....	7 Johns. Ch. 150.....	490
Fink v. Ice Co.....	84 Iowa, 321; 51 N. W. Rep. 155.	711
Finnegan v. Campbell.....	74 Iowa, 158; 37 N. W. Rep. 127.	569
First National Bank of Albia v. City Council of Albia	86 Iowa, 28; 52 N. W. Rep. 334..	4
Fisher v Chaffee	96 Iowa, 15; 64 N. W. Rep. 663..	576
Fisher v. Holden	47 N. W. Rep. (Mich) 1063.....	126
Fleming v. Stearns.....	79 Iowa, 256; 44 N. W. Rep. 376.	55
Fogg v. Holcomb.....	64 Iowa, 631; 21 N. W. Rep. 111.	135
Ford v. Knapp	102 N. Y. 136; 6 N. E. Rep. 238..	158
Fowler v. Lamson	34 N. E. Rep (Ill. Sup) 932.....	165
Fremont County v. B. & M. R. Co.	22 Iowa, 91.....	136
Fromme v. Jones	13 Iowa, 474..	729
Frost v. Frost.....	11 Me. 235.....	92
Funk v. Cresswell.....	5 Iowa, 63.....	232
Furenes v. Mickelson.....	86 Iowa, 508; 53 N. W. Rep. 416	
171, 179,	327

G

Gage v. Maschmeyer	72 Iowa, 696; 34 N. W. Rep. 482..	257
Garden Grove Bank v. Humes- ton & S. R. Co.....	67 Iowa, 526; 25 N. W. Rep. 761..	266
Garrett v. Telegraph Co.....	83 Iowa, 257; 49 N. W. Rep. 88..	222
Garrigan v. Knight	47 Iowa, 525.....	183, 184, 188
Gasser v. Sun Fire Office.....	42 Minn 315; 44 N. W. Rep. 252.	619
Gibbons v. Railway Co.....	66 Iowa, 231; 28 N. W. Rep. 644.	511
Gilruth v. Gilruth.....	40 Iowa, 346.....	678
Good v. Insurance Co.....	43 Ohio St. 394; 2 N. E. Rep. 420.	518
Goodnow v. Litchfield.....	63 Iowa, 275; 19 N. W. Rep. 226..	135
Goodnow v. Moulton.....	51 Iowa, 555; 2 N. W. Rep. 395..	133
Goodnow v. Oakley.....	68 Iowa. 27; 25 N. W. Rep. 912..	134
Goodnow v. Stryker.....	62 Iowa, 221; 14 N. W. Rep. 845..	134
Goodnow v. Wells.....	76 Iowa, 774; 38 N. W. Rep. 172.	135
Gosselink v. Campbell	4 Iowa, 296.....	601
Graessle v. Carpenter	70 Iowa, 166; 30 N. W. Rep. 392.	239
Grant v. City of Davenport.....	36 Iowa, 396.....	98
Grant v. Land Co.....	54 Iowa, 673; 7 N. W. Rep. 113..	132
Graves v. Spedden	46 Md. 527.....	87
Gray's Heirs v. Gray's Adminis- trators	22 Ala. 236.....	85
Greedy v. McGee.....	55 Iowa, 759; 8 N. W. Rep. 651..	56
Green v. Green.....	9 Cow. 46.....	92
Green v. Insurance Co.....	84 Iowa, 135; 50 N. W. Rep. 558..	552

Greenfield v. Railway Co.....	88 Iowa, 270; 49 N. W. Rep. 97	289
Greenleaf v. Railroad Co	29 Iowa, 14.....	510
Griffith v. Harvester Co.....	92 Iowa, 634; 61 N. W. Rep. 243..	311
Grimes v. City of Burlington...	74 Iowa, 123; 37 N. W. Rep. 107. 3, 4	
Grindem v. Grindem.....	89 Iowa, 295; 56 N. W. Rep. 505..	347
Grubb v. Louisa County.....	40 Iowa, 314.....	527
Grube v. Wells.....	34 Iowa, 148.....	157
Guidry v. Grivot.....	14 Am. Dec. 192.....	571

H

Haas v. Railroad Co.....	81 Ga. 792; 7 S. E. Rep. 629.....	267
Hahn v. Miller.....	68 Iowa, 745; 28 N. W. Rep. 51..	570
Haight v. Keokuk.....	4 Iowa, 199.....	570
Hale v. Gibbs.....	43 Iowa, 380.....	373
Hamer v. Sidway.....	124 N. Y. 538; 27 N. E. Rep. 256..	705
Hamilton v. Insurance Co.....	136 U. S. 242; 10 Sup. Ct. Rep. 945	620
Hamilton v. Insurance Co	137 U. S. 370; 11 Sup. Ct. Rep. 133	620
Hammer v. Railway Co.....	70 Iowa, 623; 25 N. W. Rep. 246.	317, 373
Handrahan v. O'Regan.....	45 Iowa, 298.....	704
Hanger v. City of Des Moines..	52 Iowa, 193.....	77
Hanks v. Brown.....	79 Iowa, 560; 44 N. W. Rep. 811.	416
Harkness v. Telegraph Co.....	73 Iowa, 190; 34 N. W. Rep. 811.	222
Harle v. Insurance Co.....	71 Iowa, 401; 32 N. W. Rep. 396.	309
Harris v. Insurance Co.....	53 Iowa, 236, 5 N. W. Rep. 124..	300
Harris v. Insurance Co.....	85 Iowa, 238; 52 N. W. Rep. 128.	552
Harris v. Stone.....	8 Iowa, 322.....	676
Harrison v. Charlton.....	42 Iowa, 574.....	665
Harrison v. McKim.....	18 Iowa, 485.....	318
Hathaway v. Insurance Co	64 Iowa, 231; 20 N. W. Rep. 164.	317
Hauenstein v. Lynham.....	100 U. S. 483.....	172
Havins v. Patterson.....	43 N. Y. 218.....	92
Haworth v. Manufacturing Co..	37 Iowa, 765; 51 N. W. Rep. 63..	711
Hayes v. Railroad Co.....	45 Minn. 17; 47 N. W. Rep. 260..	290
Hazard v. City of Council Bluffs	37 Iowa, 51; 53 N. W. Rep. 1033.	104
Heimbach's Appeal.....	7 Atl. Rep. (Pa. Sup.) 737.....	13
Hench v. Insurance Co.....	15 Atl. Rep. (Pa. Sup.) 671.....	431
Hendrickson v. Kingsbury.....	21 Iowa, 379.....	218
Herndon v. Insurance Co.	107 N. C. 191; 12 S. E. Rep. 240..	620
Herron v. Telegraph Co.....	90 Iowa, 129; 57 N. W. Rep. 696.	222
Hervey v. Savery.....	48 Iowa, 313.....	126
Heusinkveld v. Insurance Co...	95 Iowa, 504; 64 N. W. Rep. 594.	115, 118
Heuston v. Simpson.....	115 Ind. 62; 17 N. E. Rep. 261.....	58
Hicks v. Insurance Co.....	71 Iowa, 119; 32 N. W. Rep. 201.	431
Higgins v. Reed.....	74 Am. Dec. 309, 312.....	515
High's Appeal.....	21 Pa. St. 283.....	85
Hill v. Boyland.....	40 Miss 618.....	644
Hintrager v. Sumbargo.....	54 Iowa, 604; 7 N. W. Rep. 93..	494
Hockstedler v. Railroad Co....	88 Iowa, 236; 55 N. W. Rep. 74..	29
Hollis v. Insurance Co.....	65 Iowa, 454; 21 N. W. Rep. 774.	552
Holmes v. Blyler.....	80 Iowa, 365; 45 N. W. Rep. 756..	417
Home Ins Co. v. Baltimore Ware-	93 U. S. 527.....	308
house Co.....	95 Iowa, 331; 64 N. W. Rep. 261..	55
Hood v. Railway Co.....	13 B. Mon. 526.....	87
Hook v. Hook.....	42 Am. Dec. 628.....	571
Horton v. Smith.....	1 Iowa, 86.....	259
Houston v. Walcott.....		

Hove v. McHenry.....	60 Iowa, 327; 14 N. W. Rep. 301.	238
Howard v. Watson	76 Iowa, 239; 41 N. W. Rep. 45...	537
Howland v. Jenel	56 N. W. Rep (Minn.) 581.	260
Hunt v. Ambruster	17 N. J. Eq. 208.....	213
Hunt v. City of Boonville	65 Mo. 620.....	430
Hunt v. Coe	15 Iowa, 197.....	365
Hurley v. Osler	44 Iowa, 642.....	386
Huston v. City of Council Bluffs.....	101 Iowa, 38; 69 N. W. Rep. 1130..	637
Hutchinson v. Insurance Co.....	158 Mass. 143; 26 N. E. Rep. 439..	620
Hutchinson v. Reed.....	Hoff. Ch. 316.....	487

I

Iimas v. Neidt	101 Iowa, 84 ^a ; 70 N. W. Rep. 203 .	347
Ill. Cent. R. Co. v. City of Bloomington	76 Ill. 447.....	630
Independence Mill Co. v. Burlington, C. R. & N. R'y Co.....	72 Iowa, 535; 34 N. W. Rep. 820.	265
Independent District v. Miller.....	93 Iowa, 676; 61 N. W. Rep. 376.	96
Independent District of Boyer v. King.....	80 Iowa, 497; 45 N. W. Rep. 908.	205
In re Blockley v. Blockley.....	29 Ch. Div. 250.....	85
In re Dorsey.....	7 Port 371.....	645
In re Estate of Lyons	70 Iowa, 375; 30 N. W. Rep. 644..	85
In re Flint's Estate.....	84 Pac. Rep. (Cal.) 863	58
In re Hathaway	71 N. Y. 238.....	645
In re Johnson	87 Iowa, 130; 54 N. W. Rep. 69...	356
In re Layman's Will	40 Minn. 371; 42 N. W. Rep. 286.	57
In re Oaths Taken by Attorneys	20 Johns 498.....	644
In re Proctor's Estate.....	95 Iowa, 172; 63 N. W. Rep. 670.	347
In re Rahrer.....	140 U. S. 545; 11 Sup. Ct. Rep. 865	65
In re Swenson's Estate	56 N. W. Rep. 1115 (Minn.).....	325
Insurance Co. v. Bowdre.....	67 Miss. 620; 7 So. Rep. 596.....	559
Insurance Co. v. Clancy.....	71 Tex. 5; 8 S. W. Rep. 680.....	620
Insurance Co. v. Culver.....	6 Ind. 137.....	415
Insurance Co. v. Dowdall.....	159 Ill. 179; 43 N. E. Rep. 606.....	560
Insurance Co. v. Earle.....	38 Mich. 143.....	559
Insurance Co. v. Eldredge.....	102 U. S. 545.....	487
Insurance Co. v. Hayden	90 Ky. 39; 13 S. W. Rep. 585.....	560
Insurance Co. v. Hocking	18 Atl. Rep. (Pa. Sup.) 614.....	116
Insurance Co. v. McCrea.....	4 G. Greene, 229.....	621
Insurance Co. v. McCrea.....	8 Lea, 513.....	558
Insurance Co. v. Norton	96 U. S. 234.....	559
Insurance Co. v. Rand.....	24 N. H. 428.....	306
Insurance Co. v. Schmidt.....	13 Atl. Rep. (Pa. Sup.) 317.....	431
Insurance Co. v. Whitehill	25 Ill. 382.....	115

J

Jackson v. Green	7 Wendle, 333	181
Jacobs v. Insurance Co	86 Iowa, 145; 53 N. W. Rep. 101.	117
Jayne v. Drorbaugh	63 Iowa, 711; 17 N. W. Rep. 438.	611
Jean v. Hennessy.....	74 Iowa, 348; 37 N. W. Rep. 771.	240
Jenkins v. Bisbee.....	1 Edw. Ch. 377.....	437
Jenks v. Shaw.....	99 Iowa, 604; 69 N. W. Rep. 900.	490
Johnson v. Harder.....	45 Iowa, 679.....	142, 870
Johnson v. Hoyle.....	3 Head, 57.....	86
Johnson v. Knapp.....	36 Iowa, 616.....	704
Johnson v. Mantz.....	69 Iowa, 710; 27 N. W. Rep. 467.	403
Jones' Executors v. Clark.....	25 Grat 656.....	490
Jones v. Clark	31 Iowa, 497.....	126

Jones v Hockman	12 Iowa, 108.....	157
Jorden v. Wooden	98 Iowa, 458; 61 N. W. Rep. 948.	347

K

Kansas Cent. R. Co. v. Jackson County Com.....	45 Kan. 716; 26 Pac Rep 894....	630
Kendall v. City of Albia.....	73 Iowa, 241; 34 N. W. Rep. 833.	102
Kennedy v. Independent School District.....	48 Iowa, 189.....	646
Keokuk v Scroggs.	39 Iowa, 447.....	77
Kepple v. City of Keokuk.....	61 Iowa, 653; 17 N. W. Rep. 140..	443
Kern v. Wilson.....	73 Iowa, 490; 35 N. W. Rep. 594..	44
Kern v. Wilson.....	82 Iowa, 407; 48 N. W. Rep. 919..	114
Ketchum v. Everson.....	13 Johns. Ch. 358.....	92
Kimball v. Harman	34 Md. 401.....	611
King v. Chase	15 N. H. 9.....	570
King v. Insurance Co.....	72 Iowa, 810; 38 N. W. Rep. 690..	552
Kinney v. Slattery.....	51 Iowa, 853.....	157
Kirkman v. Insurance Co.....	90 Iowa, 457; 57 N. W. Rep. 952..	561
Koenigs v. Railroad Co.....	98 Iowa, 569; 65 N. W. Rep. 814..	317, 378
Kruidenier v. Shields.....	77 Iowa, 504; 42 N. W. Rep. 432.	494
Kuen v. Umpier.....	98 Iowa, 398; 67 N. W. Rep. 374..	490
Kull v. Kull.....	37 Hun. 476.....	172

L

Lafever v. Stone.....	55 Iowa, 49; 7 N. W. Rep. 400...	403
Lamb v. Shays.....	14 Iowa, 567.....	568
Lamberton v. Insurance Co....	39 Minn. 129; 39 N. W. Rep. 76.	558
Land Co. v. Antoine.....	52 Iowa, 429; 3 N. W. Rep. 468..	132
Land Co. v. Fitchpatrick.....	52 Iowa, 244; 3 N. W. Rep. 40....	132
Land Co. v. Griffey.....	72 Iowa, 505; 34 N. W. Rep. 804..	129
Land Co. v. Mickel.....	41 Iowa, 402.....	674
Lange v. Braynard.....	104 Cal. 156; 37 Pac. Rep. 868....	436
Larson v. Williams.....	100 Iowa, 110; 69 N. W. Rep. 442..	403
Lash v. Lash.....	57 Iowa, 88; 10 N. W. Rep. 802..	178
Lavery v. Hall.....	19 Iowa, 526.....	676
Lavery v. Vanarsdale.....	65 Pa. St. 507.....	611
Lawrence v. Miller.....	86 N. Y. 181.....	92
Lawrence v. Thomas	84 Iowa, 362; 51 N. W. Rep. 11..	357
Leach v. Hall	95 Iowa, 611; 64 N. W. Rep. 798.	158, 159
Lead Co. v. Haas.....	73 Iowa, 399; 33 N. W. Rep. 657; 85 N. W. Rep. 494.....	730
Leisy v. Hardin	135 U. S. 100; 10 Sup. Ct. Rep. 681	64
Levy's Lessee v McCartee.....	6 Pet. 102.....	130
Levine v. Insurance Co.....	68 N. W. Rep. (Minn.) 855.....	620
Lewis v. Soule.....	52 Iowa, 11; 2 N. W. Rep. 900....	212
Lindell v. Rokes.....	21 Am. Rep. 395.....	705
Lindley v. Snell.....	80 Iowa, 103; 45 N. W. Rep. 726..	570
Litchfield v Sewell.....	97 Iowa, 247; 66 N. W. Rep. 104..	157
Little v Insurance Co.....	123 Mass. 880.....	560
Livermore v. Maxwell.....	37 Iowa, 705; 55 N. W. Rep. 37..	489
Lodge v. Insurance Co.....	91 Iowa, 103; 58 N. W. Rep. 1089	431
Lookabill v. Foulks	83 Iowa, 423; 49 N. W. Rep. 1019.	311
Lumber Co. v Smith	71 Wis. 304; 37 N. W. Rep. 412...	370
Lyon v. McIlvaine.....	24 Iowa, 9.....	790

M

Machine Co. v. Brower.....	88 Iowa, 607; 55 N. W. Rep. 537.	560
Machine Co. v. Holcomb.....	40 Iowa, 33.....	40
Mack v. Brown.....	113 N. C. 451; 17 S. E. Rep. 416..	40
Magee v. Railway Co.....	82 Iowa, 249; 48 N. W. Rep. 92...	511
Manning v. Meredith.....	69 Iowa, 490; 29 N. W. Rep. 836.	378
Manufacturing Co. v. Johnson.	97 Mich. 81; 56 N. W. Rep. 932..	40
Manufacturing Co. v. Lyons.....	153 Ill. 427; 38 N. E. Rep. 661.....	40
Manville v. Telegraph Co.....	37 Iowa, 214.....	222
Marble Co. v. Linesenmeyer....	80 Iowa, 253; 45 N. W. Rep. 766.	746
Marder v. Wright.....	70 Iowa, 42; 29 N. W. Rep. 799..	408
Marshall v. Sherman.....	42 N. E. Rep. (N. Y. App.) 419..	165
Marshall v. Westrope.....	98 Iowa, 324; 67 N. W. Rep. 257.	354
Martin v. Insurance Co.....	85 Iowa, 648; 52 N. W. Rep. 534..	432
Mason v. Association.....	18 U. C. C. P. 19.....	415
Mass. Cent. R. Co. v. Boston, C. & F. R. Co.....	121 Mass. 124.....	630
May v. Black.....	45 N. W. Rep. (Wis.) 949.....	165
McCaleb v. Smith.....	24 Iowa, 591.....	371
McCarty v. Rochel.....	85 Iowa, 427; 52 N. W. Rep. 361.	157
McClain v. McClain.....	52 Iowa, 272; 3 N. W. Rep. 60...	389
McConnell v. Denham.....	72 Iowa, 494; 34 N. W. Rep. 298..	257
McDonald v. Moore.....	65 Iowa, 171; 21 N. W. Rep. 504..	257
McElroy v. Insurance Co.....	29 Pac. Rep. (Kan. Sup.) 478....	116
McGill v. Griffin.....	32 Iowa, 445.....	280
McGinty v. City of Keokuk....	66 Iowa, 725; 24 N. W. Rep. 506..	102
McGregor v. Comstock.....	8 N. Y. 408.....	181
McGrew v. Railway Co.....	21 S. W. Rep. (Mo. Sup.) 463....	380
McGuire v. Brown.....	41 Iowa, 650.....	179
McIntire v. Cagley.....	37 Iowa, 676.....	281
McIntyre v. Insurance Co.....	17 N. W. Rep. (Mich.) 781.....	116
McKee v. Railway Co.....	88 Iowa, 616; 50 N. W. Rep. 209..	510
McKinley v. Railway Co.....	44 Iowa, 314.....	498
McKinney v. Railroad Co.....	104 N. Y. 352; 10 N. E. Rep. 544..	122
McMahill v. McMahonill.....	69 Iowa, 115; 28 N. W. Rep. 471..	84
McManus v. Blackmarr.....	50 N. W. Rep. (Minn.) 230.....	92
McNamara v. Harrison.....	81 Iowa, 486; 46 N. W. Rep. 976..	312
McNamee v. Moreland.....	26 Iowa, 96.....	157
McPherson v. Foster.....	48 Iowa, 48.....	99
Meeker v. Meeker.....	16 Conn. 383.....	384
Meinzer v. City of Racine.....	74 Wis. 166; 42 N. W. Rep. 230..	444
Merriam v. Moody's Executors..	25 Iowa, 168.....	77
Merrill v. Luce.....	61 N. W. Rep. (S. D.) 43.....	490
Merrill v. Monticello.....	138 U. S. 673; 11 Sup. Ct. Rep. 441	78
Merrill v. Tobin.....	82 Iowa, 529; 48 N. W. Rep. 1044.	135
Mershon v. Insurance Co.....	34 Iowa, 87.....	371
Metteer v. Wiley.....	34 Iowa, 214.....	587
Meyer v. Evans.....	66 Iowa, 179; 23 N. W. Rep. 386..	205
Mickley v. Tomlinson.....	79 Iowa, 383; 41 N. W. Rep. 311..	403
Miller v. Hollingsworth.....	36 Iowa, 163.....	362
Milliken v. Pratt.....	125 Mass. 374.....	68
Mielenz v. Quasdorf.....	68 Iowa, 726; 28 N. W. Rep. 41...	23
Mills v. Hamilton.....	49 Iowa, 105.....	212
Money v. Coal Co.....	55 Iowa, 671; 8 N. W. Rep. 652..	510
Montgomery County v. Sever- son.....	68 Iowa, 451; 27 N. W. Rep. 377.	133
Mooar v. Walker.....	46 Iowa, 164.....	257
Moore v. Gilbert.....	46 Iowa, 508.....	371
Moore v. Graves.....	97 Iowa, 4; 65 N. W. Rep. 1008..	382
Moore v. Insurance Co.....	72 Iowa, 414; 34 N. W. Rep. 183.	115

Moore v. Pierson.....	6 Iowa, 278.....	421
Moore v. Railway Co.....	78 Wis 120; 47 N. W. Rep. 273..	290
Moore v. Weaver.....	53 Iowa, 11; 8 N. W. Rep. 741..	179
Morrell v. Insurance Co.....	33 N. Y. 439.....	518
Morris v. Morris.....	21 N. E. Rep (Ind. Sup.) 918 ..	58
Morrison v. Insurance Co.....	69 Tex 358; 6 S. W. Rep. 605...	558
Morse v. Marshall.....	22 Iowa, 290.....	566
Mortell v. Friel.....	85 Iowa, 738; 52 N. W. Rep. 513.	494
Mosness v. Insurance Co.....	50 Minn. 341; 52 N. W. Rep. 932.	620
Moss & Co v. Dearing.....	45 Iowa, 580.....	570
Mower v. Fletcher.....	116 U. S. 880; 6 Sup. Ct. Rep. 409	132
Moy v. Moy.....	89 Iowa, 512; 56 N. W. Rep. 668.	158
Muldowney v. Railroad Co.....	36 Iowa, 463.....	511
Muldowney v. Railroad Co.....	39 Iowa, 615.....	510
Murphy v. Mulgrew.....	86 Pac. Rep. (Cal.) 857.....	571
Musser v. Crum.....	48 Iowa, 52.....	281
Myers v. San Francisco.....	42 Cal. 215.....	426

N

Nason v. Woodward.....	16 Iowa, 216.....	92
Nave v. Adams.....	17 S. W. Rep. (Mo. Sup) 958....	126
Neeley v. Wise.....	44 Iowa, 544.....	179
Nichols v. Railroad Co.....	69 Iowa, 154; 28 N. W. Rep. 571.	511
Nicrosi v. Irvine.....	15 So. Rep. (Ala.) 429.....	566
Nolan v. Mendene.....	14 S. W. Rep. (Tex. Sup.) 167...	19
Norton v. State.....	74 Ind. 837.....	655

O

Ogg v. City of Lansing.....	35 Iowa, 495.....	426
Okey v. Sigler.....	82 Iowa, 98; 47 N. W. Rep. 911..	576
Old Saucelito Land & Dry Dock Co. v. Commercial Union Assurance Co.....	66 Cal. 253; 5 Pac. Rep. 232.....	620
O'Leary v. Insurance Co.....	100 Iowa, 173; 69 N. W. Rep. 420.	560
O'Leary v. Insurance Co.....	100 Iowa, 390; 69 N. W. Rep. 686	552, 560
Olson v. Neal.....	63 Iowa, 214; 18 N. W. Rep. 863.	504
Opel v. Shoup.....	100 Iowa, 407; 69 N. W. Rep. 560..	171
Ordway v. Suchard.....	31 Iowa, 481.....	240
Osborne v. Backer.....	81 Iowa, 375; 47 N. W. Rep. 70...	559
Osman v. Winters.....	35 Pac. Rep. (Or.) 250.....	586

P

Paddleford v. Cook.....	74 Iowa, 433; 33 N. W. Rep. 137	142, 370
Padden v. Moore.....	58 Iowa, 703; 12 N. W. Rep. 724.	257
Page v. McDonnell.....	55 N. Y. 299.....	92
Parker v. Parker.....	102 Iowa, 500; 71 N. W. Rep. 421..	690
Parsons v. Parsons.....	66 Iowa, 754; 21 N. W. Rep.	570; 24 N. W. Rep. 564... 360, 372
Paukett v. Livermore.....	5 Iowa, 277.....	504
Payne v. Wilson.....	76 Iowa, 377; 41 N. W. Rep. 45...	568
Pelamourges v. Clark.....	9 Iowa, 1.....	360
People v. Bedell.....	2 Hill. 196.....	644
People v. Bennett.....	49 N. Y. 137.....	698
People v. Eaton.....	59 Mich. 559; 26 N. W. Rep 703	695, 700
People v. Hays.....	7 How. Prac (N. Y.) 248.....	644
People v. Henry.....	77 Cal. 445; 19 Pac. Rep. 830 ...	655

CASES CITED.

845

People v. Langdon	40 Mich. 673.....	644, 649
People v. Lattimore.....	86 Cal. 403; 24 Pac. Rep. 1091 ..	695
People v. Nostrand.....	46 N. Y. 375.....	647
People v. Palmer.....	109 N. Y. 110; 16 N. E. Rep. 529 ..	698
Perigo v. Railroad Co.....	52 Iowa, 276; 8 N. W. Rep. 48....	510
Peterson v. Ferreby.....	80 Iowa, 327.....	12
Peterson v. Machine Co.	97 Iowa, 148; 66 N. W. Rep. 96....	559
Philbrooke v. Insurance Co.....	37 Me. 137.....	306
Phillips v. Phillips.....	90 Iowa, 541; 58 N. W. Rep. 879..	385
Pioneer Mfg. Co. v. Phoenix Ins. Co.....	106 N. C. 28; 10 S. E. Rep. 1057...	620
Pitman v. Molsberry.....	49 Iowa, 339.....	371
Pitsinowsky v. Beardsley.....	37 Iowa, 1.....	560
Pitts v. State.....	43 Miss. 473.....	698
Platt v. Railway Co.....	84 Iowa, 694; 51 N. W. Rep. 254.	511
Plow Co v. Braden.....	71 Iowa, 141; 32 N. W. Rep. 247.	40
Potter v. Railway Co.....	46 Iowa, 399.....	10
Poweshiek County v. Ross.....	9 Iowa, 511.....	515
Presbyterian Church v. Logan..	77 Iowa, 326; 43 N. W. Rep. 810.	354
Printing Co. v. Howell.....	26 Or 527; 38 Pac. Rep. 547.....	611
Putnam v. Osgood.....	51 N. H. 193.....	415

R

Railroad Co. v. Byington.....	14 Iowa, 572.....	12
Railroad Co. v. Capner.....	49 N. J. Law, 555; 9 Atl. Rep. 781	630
Railroad Co. v. Countryman....	44 N. E. Rep. 265 (Ind. Sup.)....	290
Railway Co. v. Fulmore.....	29 S. W. Rep. (Tex. Civ. App.) 688	290
Railroad Co. v. Grinnell.....	51 Iowa, 476; 1 N. W. Rep. 712..	129, 186
Railroad Co. v. Haynes.....	42 Pac. Rep. (Kan. App.) 259.....	290
Railroad Co. v. Hoover.....	43 Pac. Rep. (Kan. App.) 854.....	200
Railroad Co. v. Hough.....	61 Mich. 507; 28 N. W. Rep. 532..	630
Railroad Co. v. Spencer.....	149 Ill. 97; 86 N. E. Rep. 91.....	290
Read v. Howe.....	49 Iowa, 65.....	133
Reddin v. Gates.....	52 Iowa, 210; 2 N. W. Rep. 1079.	218
Reed v. Larrison.....	77 Iowa, 399; 42 N. W. Rep. 833.	746
Reichelt v. Seal.....	76 Iowa, 275; 41 N. W. Rep. 16. .	12
Renihan v. Dennin.....	108 N. Y. 573; 9 N. E. Rep. 320...	57
Renier v. Insurance Co.....	74 Wis. 89; 42 N. W. Rep. 210....	559
Reynolds v. Wilmeth.....	45 Iowa, 693.....	159
Richards v. Insurance Co.....	47 N. W. Rep. (Mich.) 350.....	308
Riddlesbarger v. Insurance Co..	7 Wallace, 391.....	115
Rindge v. Baker.....	57 N. Y. 209.....	210
Ritchey v. Davis.....	11 Iowa, 124.....	504
Roach v. Waid.....	2 T. B. Mon 142.....	92
Robertson v. Parks.....	76 Md. 118; 24 Atl. Rep. 411.....	611
Robinson v. Berkey.....	100 Iowa, 136; 69 N. W. Rep. 434.	559
Robinson v. Robinson.....	22 Iowa, 427.....	386
Rock v. Singmaster.....	62 Iowa, 511; 17 N. W. Rep. 744.	259
Rogers v. Vass.....	6 Iowa, 405.....	97
Rokes v. Insurance Co.....	51 Md. 512.....	560
Ronn v. City of Des Moines....	78 Iowa, 63; 42 N. W. Rep. 582..	104
Root v. Heil.....	78 Iowa, 436; 43 N. W. Rep. 278.	281
Root v. Sturdivant.....	70 Iowa, 55; 29 N. W. Rep. 802...	218
Ross v. Hayne.....	3 G. Greene, 211.....	386
Rowland v. Mayor, Etc.....	88 N. Y. 372.....	645
Russell v. Insurance Co.....	71 Iowa 69; 78 Iowa, 216; 32 N. W. Rep. 95.....	432
Russell v. Jackson.....	9 Hare, 387.....	57
Ruloff v. People.....	18 N. Y. 179.....	698

Runkle v. Insurance Co.....	99 Iowa, 414; 68 N. W. Rep. 712.	482
Ruthven v. Insurance Co.....	92 Iowa, 816; 60 N. W. Rep. 663..	550

S

Sankey v. Cook	82 Iowa, 125; 47 N. W. Rep. 1072.	471
Savage v. Tullar.....	Brayt. 223.....	506
Savery v. Sypher.....	39 Iowa, 675.....	471
Sawyers v. Commonwealth...	89 Va. 556; 18 S. E. Rep. 708....	699
Schaefert v. Railroad Co.....	63 Iowa, 644; 17 N. W. Rep. 898.	317
Schultze v. Schultze.....	38 N. E. Rep. (Ill. Sup) 201.....	172
Scott v. Luther.....	44 Iowa, 570.....	519
Scotten v. Fegan.....	62 Iowa, 286; 17 N. W. Rep. 491..	415
Scroggin v. Wood	87 Iowa, 502; 54 N. W. Rep. 487.	238
Searle v. Insurance Co.....	152 Mass. 268; 25 N. E. Rep. 290..	580
Sears v. Sellew.....	28 Iowa, 501.....	159
Sedgwick v. Railroad Co.....	76 Iowa, 340; 41 N. W. Rep. 85...	511
SeEVERS v. Hamilton.....	11 Iowa, 66	126, 621
Shallcross v. Deats.....	48 N. J. Law, 177.....	587
Shaw v. Hichcock.....	119 Mass. 254	18
Shaw v. Orr	80 Iowa, 355.....	577
Shaw v. Railroad Co.....	101 U. S 557.....	267
Sheahan v. Berry.....	27 Mich. 217.....	586
Shelby v. Alcorn.....	86 Miss. 273.....	646, 647
Sheldon v. Root.....	28 Am. Dec. 266.....	568
Shelley v. Smith.....	50 Iowa, 543.....	408
Shelley v. Smith.....	97 Iowa, 259; 66 N. W. Rep. 172	322
Sherwood v. Snow	46 Iowa, 481.....	317 873
Shimer v. Hammond.....	51 Iowa, 401; 1 N. W. Rep. 656..	481
Shiple v. Reasoner.....	87 Iowa, 555; 54 N. W. Rep. 470.	870
Short v. Insurance Co.....	90 N. Y. 16	803
Sigler v. Gondon.....	68 Iowa, 441; 27 N. W. Rep. 873	126, 621
Silvers & Traverse.....	82 Iowa, 52; 47 N. W. Rep. 888..	108
Skinner v. Crawford.....	54 Iowa, 119; 6 N. W. Rep. 144 ..	157
Smith v. City of New York.....	37 N. Y. 520.....	645
Smith v. Clarke	9 Iowa, 241.....	566
Smith v. Howard	28 Iowa, 51	504
Smith v. Phelps	32 Iowa, 587.....	805
Smith v. Railroad Co.....	86 Iowa, 203; 53 N. W. Rep. 128..	295
Smith v. Skow	97 Iowa, 640; 66 N. W. Rep. 894.	578
Smith v. Town of Ontario.....	4 Fed. Rep. 386.....	570
Smith v. Zuckmeyer.....	53 Iowa, 14; 3 N. W. Rep. 782 ...	183
Smock v. Pierson.....	34 Am. Rep. 269.....	708
Soper v. Henry County.....	26 Iowa, 264.....	232
Sorenson v. Davis	83 Iowa, 405; 49 N. W. Rep. 1004	158
Sorrell v. Railroad Co.....	75 Ga. 509.....	830
Spencer v. Blaisdell.....	17 Am. Dec. 412.....	568
Sprague v. Atlee.....	81 Iowa, 1; 46 N. W. Rep. 756 ..	587
Squier v. Parks	56 Iowa, 407; 9 N. W. Rep. 324..	215
Stanbrough v. Daniels.....	77 Iowa, 561; 42 N. W. Rep. 448.	480
Stanhope v. Swafford.....	87 Iowa, 45; 45 N. W. Rep. 408..	372
State v. Beasley.....	84 Iowa, 88; 50 N. W. Rep. 570..	697
State v. Bigelow.....	101 Iowa, 480; 70 N. W. Rep. 601.	656
State v. Blake.....	36 N. J. Law, 443.....	218
State v. Blunt.....	59 Iowa, 468; 13 N. W. Rep. 427.	655
State v. Brady	100 Iowa, 191; 69 N. W. Rep. 290	415, 687
State v. Brennan.....	29 N. E. Rep. (Ohio) 598.....	646, 647
State v. Bruce.....	48 Iowa, 530.....	80
State v. Bus	86 S. W. Rep. (Mo. Sup) 686....	646

State v. Cadwell.....	79 Iowa, 432; 44 N. W. Rep. 700.	303
State v. Carroll.....	85 Iowa, 1; 51 N. W. Rep. 1159...	698
State v. Carter.....	100 Iowa, 501; 69 N. W. Rep. 880	
	656, 667,	695
State v. Chicago, B. & Q. R. Co.	29 Neb. 412; 45 N. W. Rep. 469..	630
State v. Clark.....	29 N. J. Law (5 Dutch.) 96.....	506
State v. Cloughly.....	78 Iowa, 626; 85 N. W. Rep. 652..	66
State v. Day.....	79 Me 120; 8 Atl. Rep. 544.....	700
State v. District Court.....	44 N. W. Rep (Minn.) 7.....	630
State v. Emmons.....	72 Iowa, 265; 33 N. W. Rep. 672..	654
State v. Franks.....	64 Iowa, 89; 19 N. W. Rep. 832...	654
State v. Garrity.....	98 Iowa, 101; 67 N. W. Rep. 92...	663
State v. Halleck.....	26 N. W. Rep. (Wis) 572.....	700
State v. Hocker.....	22 So. Rep (Fla.) 721.....	646
State v. Jelinek.....	95 Iowa, 420; 64 N. W. Rep. 260...	654
State v. Jennings.....	79 Iowa, 513; 44 N. W. Rep. 799..	655
State v. Jones.....	10 Iowa, 206.....	655
State v. Keeler.....	28 Iowa, 551.....	698
State v. King.....	97 Iowa, 440; 66 N. W. Rep. 735..	656
State v. LaGrange.....	99 Iowa, 10; 68 N. W. Rep. 557...	656
State v. Lavin.....	80 Iowa, 555; 46 N. W. Rep. 553..	186
State v. Lawson.....	46 Am. Dec. 298.....	568
State v. Livingston.....	64 Iowa, 560; 21 N. W. Rep. 34...	80
State v. Massey.....	97 N. C. 465; 2 S. E. Rep. 445...	506
State v. O'Brien.....	81 Iowa, 88; 46 N. W. Rep. 861...	664
State v. Preston.....	34 Wis 675.....	506
State v. Rivers.....	68 Iowa, 611; 27 N. W. Rep. 781..	654
State v. Semotan.....	85 Iowa, 57; 51 N. W. Rep. 1161..	654
State v. Sherwood.....	90 Iowa, 550; 58 N. W. Rep. 911..	684
State v. Shields.....	89 Mo. 259; 1 S. W. Rep. 336.....	655
State v. Sipult.....	81 Iowa, 40; 46 N. W. Rep. 748..	666
State v. Smith.....	63 Vt. 201; 23 Atl. Rep. 604.....	415
State v. Stickley.....	41 Iowa, 232.....	360
State v. Teeter.....	69 Iowa, 717; 27 N. W. Rep. 485..	654
State v. Teeters.....	97 Iowa, 458; 66 N. W. Rep. 754..	690
State v. Toombs.....	79 Iowa, 741; 45 N. W. Rep. 300..	697
State v. Valle.....	41 Mo 29.....	645
State v. Ward.....	61 Vt. 153; 17 Atl Rep. 483.....	696
State v. Wells.....	61 Iowa, 629; 17 N. W. Rep. 90...	667
State v. Whitener.....	92 N. C. 798.....	506
State v. Wickliff.....	95 Iowa, 386; 64 N. W. Rep. 282..	196
State v. Williams.....	61 Iowa, 517; 16 N. W. Rep. 586..	543
State v. Williams.....	90 Iowa, 513; 58 N. W. Rep. 904..	126
State v. Wilson.....	29 Ohio St 347.....	645, 646
Steele v. Frierson.....	85 Tenn 430; 3 S. W. Rep. 649...	87
Steele v. Matteson.....	58 Mich. 313; 15 N. W. Rep. 488..	228
Stem v. Nysonger.....	69 Iowa, 512; 29 N. W. Rep. 433..	703
Stemple v. Herminghouser.....	3 G. Greene, 408.....	326
Stevens v. Insurance Co.....	69 Iowa, 658; 29 N. W. Rep. 769..	560
Stevens v. Taylor.....	58 Iowa, 664; 12 N. W. Rep. 625..	372
Stockberger v. Lindsey.....	65 Iowa, 471; 21 N. W. Rep. 782..	259
Stove Co v Shedd.....	82 Iowa, 540; 43 N. W. Rep. 933..	259
Stoughtenburgh v. Dow.....	82 Iowa, 179; 47 N. W. Rep. 1039..	341
Straughan v Hallwood.....	4 S. E. Rep. (W. Va.) 394.....	126
Strong v. Railroad Co.....	94 Iowa, 330; 63 N. W. Rep. 799..	196

T

Talbott v. Stemmons.....	12 S. W. Rep. (Ky.) 297.....	705
Taylor v. Insurance Co.....	93 Iowa, 531; 67 N. W. Rep. 577	
	558, 562	

Taylor v. Kier	54 Iowa, 645; 7 N. W. Rep. 120..	746
Taylor v. Railroad Co	80 Iowa, 431; 46 N. W. Rep. 64..	687
Teague v. LeGrand.	5 So. Rep. (Ala.) 287.....	566
Ten Eyck v. Railroad Co.....	41 N. W. Rep. (Mich.) 905.....	515
Thomas v. Gibbons.	61 Iowa, 50; 15 N. W. Rep. 593..	566
Thompson v. Ish	99 Mo 160; 12 S. W. Rep 510 ...	60
Thorp v. Bradley.....	75 Iowa, 50; 39 N. W. Rep. 177...	365
Threshing Machine Co. v. Haven	65 Iowa, 859; 21 N. W. Rep 677.	314
Tice v. Derby.....	59 Iowa, 312; 18 N. W. Rep. 301.	408
Tilden v. Blair.....	21 Wall 241.....	68
Tison v. Howard.....	57 Ga. 410.....	267
Traute v. White.....	19 Atl. Rep (N. J. Ch.) 196.....	214
Trear v. Filkins.....	10 Iowa, 568.....	146
Truman v. Bishop.....	83 Iowa, 697; 50 N. W. Rep. 278.	318
Trust Co. v. Harless.....	29 N. E. Rep (Ind. Sup.) 1062....	12
Trust Co. v. Jennings.	81 Iowa, 470; 46 N. W. Rep. 1006.	340
Trustees of Diocese of Iowa v.		
City of Anamoso.....	76 Iowa, 538; 41 N. W. Rep. 313.	444
Turner v. Cruzen	70 Iowa, 202; 30 N. W. Rep. 433..	234
Turner v. Harding	80 Iowa, 691; 45 N. W. Rep. 758.	571
Tuttle v. Polk.	92 Iowa, 433; 60 N. W. Rep. 733..	98
Tuttle v. Story County	56 Iowa, 316; 9 N. W. Rep. 292..	746
Tyler v. Salley	19 Atl. Rep (Me) 107.....	586

U

Upsen v. Fuller.....	43 Iowa, 409	22
U. S. v. Hartwell.....	6 Wall. 385	644, 647
U. S. v. Three R. R. Cars.....	1 Abb. U. S. 196; Fed. Case No.	
	16513.....	506

V

Vaden v. Hance.....	1 Head, 300.....	86
Vanhorn v. City of Des Moines.	63 Iowa, 447; 19 N. W. Rep 293.	436
Varnum v. Leek.....	65 Iowa, 751; 23 N. W. Rep 151..	151
Vaughn v. English.....	8 Cal. 39.....	644
Viele v. Insurance Co.....	26 Iowa, 9.....	552
Vore v. Insurance Co.....	76 Iowa, 548; 41 N. W. Rep...309,	115

W

Walker v. Camp.....	63 Iowa, 627; 19 N. W. Rep. 303.	504
Ward v. Railroad Co.....	68 N. W. Rep. (Minn) 1104	290
Warder v. Hoover	51 Iowa, 491; 1 N. W. Rep. 795..	43
Warder v. Robertson.....	75 Iowa, 585; 39 N. W. Rep. 905.	560
Warren v. Chandler.....	98 Iowa, 237; 67 N. W. Rep. 242..	332
Warren v. State.	1 G. Greene, 106.....	656
Wasson v. Hawkins.....	59 Fed. Rep. 233.....	201
Watson v. Cheshire.....	18 Iowa, 202.....	440
Watson v. Riskamire.....	45 Iowa, 231.....	56
Weldon v. Tollman.....	15 C. C. A. 138; 67 Fed. Rep. 986.	489
Wellover v. Soule.....	30 Mich. 481.....	259
Wells v. Railroad Co.....	56 Iowa, 520; 9 N. W. Rep 364..	510
Werner v. Flies.	91 Iowa, 146; 59 N. W. Rep. 18..	506
Wertheim v. Trust Co.....	15 Fed. Rep. 716.....	515
Westover v. Insurance Co	1 N. E. Rep. 104 (N. Y.)	57
Westphal v. Clark.....	42 Iowa, 371.....	259
Weyland v. Railroad Co.....	75 Iowa, 573; 39 N. W. Rep. 899.	266
Whipple v. Fowler.....	60 N. W. Rep (Neb.) 15.....	490
White v. Smith.....	54 Iowa, 233; 6 N. W. Rep. 284...	56
Whitefield v. McLeod.....	1 Am. Dec. 269.	703

Whitney v. Hackney.....	20 Iowa, 460.....	22
Wickersham v. Orr.....	9 Iowa, 253.....	212
Wickham v. Hull, et al.....	60 Fed. Rep. 326.....	470
Wickham v. Lumber Co.....	61 N. W. Rep. (Wis.) 287.....	260
Wilcke v. Wilcke.....	102 Iowa, 173; 71 N. W. Rep. 201.....	171
Wilhelmi v. Insurance Co.....	(Iowa) 68 N. W. Rep. 782.....	118
Wilkins v. Jewett.....	29 N. E. Rep. (Mass.) 214.....	214
Williams v. Jackson.....	107 U. S. 478; 2 Sup. Ct. Rep. 814.....	487
Williams v. U. S.....	188 U. S. 516; 11 Sup. Ct. Rep. 457.....	132
Williams v. Williams.....	61 Iowa, 612; 16 N. W. Rep. 718.....	259
Williams v. Young.....	46 Iowa, 140.....	506
Williamson v. City of Keokuk..	44 Iowa, 88.....	78
Wilson v. Hathaway.....	42 Iowa, 173.....	452
Wilson v. Irish.....	62 Iowa, 260; 17 N. W. Rep. 511.....	386
Wilson v. City of Wheeling.....	19 W. Va. 323.....	430
Wishard v. McNeil.....	78 Iowa, 40; 42 N. W. Rep. 580.....	537
Wixom v. Stephens.....	17 Mich. 518.....	519
Wolff v. Insurance Co.....	50 N. J. Law, 453.....	620
Wolford v. Powers.....	85 Ind. 294.....	705
Wood v. Curran.....	76 Iowa, 562; 41 N. W. Rep. 214.....	132
Wood v. Insurance Co.....	149 N. Y. 882; 44 N. E. Rep. 80.....	430
Wood v. Swift.....	81 N. Y. 31.....	487
Wood v. Whitton.....	66 Iowa, 295; 19 N. W. Rep. 907; 23 N. W. Rep. 675.....	317, 332
Woodruff v. Insurance Co.....	83 N. Y. 134.....	308
Woodward v. Jackson.....	85 Iowa, 432; 52 N. W. Rep. 358.....	408
Woodworth v. Mills.....	20 N. W. Rep. (Wis.) 728.....	505
Woolsey v. Williams.....	34 Iowa, 413.....	44
Worth v. Wetmore.....	87 Iowa, 62; 54 N. W. Rep. 56.....	408
Wright v. Barnard.....	89 Iowa, 166; 56 N. W. Rep. 424.....	36
Wurts v. Hoagland.....	5 Sup. Ct. Rep. 1086.....	213

Y

Young v. Daniels.....	2 Iowa, 126.....	676
Young v. Farwell.....	28 N. E. Rep. 845 (Ill. Sup.).....	165
Yount v. Carney.....	91 Iowa, 559; 60 N. W. Rep. 114.....	55

Z

Zimmerman v. Insurance Co....	77 Iowa, 686; 42 N. W. Rep. 462.....	562
Zugenbuhler v. Gilliam.....	3 Iowa, 391.....	17, 210

STATUTES CITED, CONSTRUED, ETC.,

IN THE OPINIONS REPORTED IN THIS VOLUME.

CONSTITUTION, U. S.		ACTS, TWENTY-FIRST GENERAL ASSEMBLY.	
Art 11, sec. 5.....	642	Ch. 83.....	641
REVISED STATUTES, U. S.		Ch. 149.....	418
Secs. 5151, 5153.....	473	ACTS, TWENTY-SECOND GENERAL ASSEMBLY.	
CONSTITUTION OF IOWA.		Ch. 2, sec. 1.....	75
Art. 8, sec. 26.....	98	Ch. 19, secs. 1, 2, 3, 7.....	72
Art. 11, sec. 8.....	96	Ch. 28, sec. 2.....	376, 378
ACTS, TWELFTH GENERAL ASSEMBLY.		Ch. 28, sec. 9.....	376
Ch. 86	678	Ch. 28, sec. 17.....	377, 378
ACTS, SIXTEENTH GENERAL ASSEMBLY.		Ch. 32.....	630, 631
Ch 11.....	679	Ch. 84, sec. 1.....	607
ACTS, SEVENTEENTH GENERAL ASSEMBLY.		Ch. 85, sec. 1.....	324
Ch. 58.....	72	Ch. 85, sec. 2.....	171, 324
Ch. 77, sec. 10.....	294	ACTS, TWENTY-FIFTH GENERAL ASSEMBLY.	
Ch. 132	97	Ch. 62.....	574
ACTS, EIGHTEENTH GENERAL ASSEMBLY.		Ch. 62, sec. 14.....	6
Ch. 77, sec. 3.....	641	Ch. 62, sec. 1.....	577
Ch. 115.....	527	Ch. 62, sec. 9.....	578
Ch. 140.....	72	Ch. 62, sec. 11.....	578
Ch. 153.....	202	Ch. 62, sec. 12.....	578
Ch. 153, secs. 1, 2.....	193, 194	Ch. 62, sec. 13.....	578
Ch. 185.....	281	Ch. 62, sec. 17.....	576
Ch. 211.....	618	Ch. 96.....	332
Ch. 211, sec. 3.....	114, 551	CODE OF 1851.	
ACTS, NINETEENTH GENERAL ASSEMBLY.		Sec. 1249.....	97
Ch. 94.....	526	CODE OF 1860.	
Ch. 137.....	641, 649	Sec. 3451	22
Ch. 94, secs. 2, 17, 18.....	527	CODE OF 1873.	
ACTS, TWENTIETH GENERAL ASSEMBLY.		Tit. 9, ch. 4.....	305
Ch. 24.....	295	Tit. 17, ch. 2	115
Ch. 185.....	418	Tit. 19, ch. 1.....	493
Ch. 185, sec. 11.....	414	Ch. 50	544
Ch. 192, sec. 1.....	75	Sec. 34.....	98
		Sec. 45, subd. 20.....	558
		Sec. 213, subd. 3.....	244, 245
		Sec. 464	627
		Sec. 465	444, 627
		Sec. 466.....	627
		Sec. 467.....	627
		Sec. 468.....	627
		Sec. 469.....	627

Sec. 470	627	Sec. 3064	703
Sec. 619	688	Sec. 3665	703
Sec. 630	689	Sec. 3751	56
Sec. 670	642	Sec. 3788	527
Sec. 675	642	Sec. 3789	527
Sec. 676	642	Sec. 3849	666
Sec. 679	642	Sec. 3908	640, 647
Sec. 986	451	Sec. 3917	683
Sec. 1088	167	Sec. 3918	683
Sec. 1255	11	Sec. 3983	505
Sec. 1256	11	Sec. 4004	689
Sec. 1270	627	Sec. 4302	654
Sec. 1288	628, 631	Sec. 4305	194, 655
Sec. 1292	294	Sec. 4434	663
Sec. 1550	63	Sec. 4559	666
Sec. 1922	37	Sec. 4629	546
Secs. 2019, 2020, 2027	211	Sec. 4680	546
Sec. 2030	211	Sec. 4631	546
Sec. 2112	558	Sec. 4632	546
Sec. 2115	721, 729	Sec. 4633	546
Sec. 2410	469	Sec. 4634	546
Sec. 2411	678	Sec. 4636	546
Secs. 2420, 2421	471, 473	Sec. 4642	546
Secs. 2440, 2441	184	Sec. 4643	546
Secs. 2455, 2456, 2457	177, 178	Sec. 4645	546
Sec. 2459	387	Sec. 4646	546
Sec. 2478	246	Sec. 4647	546
Sec. 2514	212	Sec. 4648	546
Sec. 2537	115, 117, 118	Sec. 4649	546
Sec. 2550	575	Sec. 4653	546
Sec. 2682	23	Sec. 4654	546
Sec. 2731	621	Sec. 4655	546
Sec. 2788	144	Sec. 4656	546
Sec. 2789	372	Sec. 4657	548
Sec. 2835	253		
Sec. 2837, subd. 3	289		
Sec. 2844	118		
Sec. 2851	114		
Sec. 2933	21		
Sec. 2934	21, 23		
Sec. 2975	255, 259, 566, 568		
Sec. 2979	256, 259		
Sec. 2980	259		
Sec. 2984	256		
Sec. 2985	256		
Sec. 3154	522		
Sec. 3154, subd. 1	494		
Sec. 3154, subds 3, 7	239		
Sec. 3155	493, 494		
Sec. 3158	493		
Sec. 3158, subd. 4	494		
Sec. 3158, subds 5, 6, 7, 8	494		
Sec. 3159	404		
Sec. 3207	332		
Sec. 3277	176, 455		
Sec. 3278	455		
Sec. 3279	455		
Sec. 3592	145		
Sec. 3639	386, 422, 680		
Sec. 3642	121		
Sec. 3643	56		
Sec. 3650	218		
		M'CLAIN'S CODE.	
		Sec. 474	525
		Sec. 1692	305, 519
		Sec. 1826	214
		Sec. 1845	214
		Sec. 2039	294
		Sec. 2332	214
		Sec. 3194	15, 18
		Sec. 3195	15
		Sec. 3550	468
		Sec. 3719	212
		Sec. 4159	282
		Sec. 4160	282
		Sec. 4161	282
		Sec. 4162	282
		Sec. 4517	389
		Sec. 4531	389
		Sec. 4532	388
		Sec. 5041	525
		Sec. 5054	525
		Sec. 5055	525
		Sec. 5060	525
		Sec. 5454	607
		Sec. 6122	525, 526
		Sec. 6135	525



